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IN THE OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1996

AMERICAN BROADCASTING COMPANIES, INC.,

Petitioner,

—v.—

LUNDELL MANUFACTURING COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a party that voluntarily injects itself in a public controversy avoid becoming a limited-purpose public figure under *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) by avoiding comment on that controversy?

2. May a corporation, which has thrust itself into the center of a continuing public controversy by soliciting and selling to a county for purchase with public funds a product touted by the corporation as the solution to a long-standing, highly controversial, public problem within the county, avoid becoming a limited-purpose public figure under *Gertz* v. *Robert Welch, Inc.* by simply eschewing comment on the controversy?

LIST OF PARTIES AND RULE 29.6 STATEMENT

American Broadcasting Companies, Inc. ("ABC") was the defendant-appellee below and is the petitioner in this Court. Lundell Manufacturing Company, Inc. ("Lundell") was the plaintiff-appellant below and is the respondent in this Court. (Capital Cities/ABC, Inc. (since renamed ABC, Inc.) was dismissed as a defendant during trial and was not a party in the appeal below.)

Pursuant to Rule 29.1, petitioner informs the Court of the following:

ABC is a wholly owned subsidiary of ABC Holding Company Inc., which is itself a wholly owned subsidiary of ABC, Inc. ABC, Inc. is a wholly owned subsidiary of Disney Enterprises, Inc., which is itself a wholly owned subsidiary of The Walt Disney Company, a publicly held corporation. ABC has no nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner American Broadcasting Companies, Inc. ("ABC") respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case, entered on October 15, 1996.

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit, review of which is sought here, is reported at 98 F.3d 351 and is reprinted in the Appendix to this Petition beginning at 1a. (The decision was filed October 15, 1996.) The denial of rehearing and suggestion for rehearing *en banc*

by the United States Court of Appeals for the Eighth Circuit on November 26, 1996 is unreported and is reprinted in the Appendix hereto at 63a.

The district court order granting judgment as a matter of law in favor of ABC, the district court ruling directing a verdict for ABC on actual malice, and the district court opinion denying summary judgment to ABC are all unreported and are reprinted in the Appendix hereto at 27a-37a, 38a-41a and 42a-62a, respectively.

JURISDICTION

The judgment of the court of appeals from which ABC seeks review was entered on October 15, 1996. A timely petition for rehearing with suggestion for a rehearing *en banc* was denied by the court of appeals on November 26, 1996. (Three judges would have granted the *en banc* rehearing.) This Petition is being timely filed within 90 days of the date of the denial by the court of appeals of the petition for rehearing.

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1332 (1994). The court of appeals had jurisdiction to hear the ensuing appeal pursuant to 28 U.S.C. § 1291 (1994). The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

STATEMENT OF THE CASE

This Petition arises from the determination of the United States Court of Appeals for the Eighth Circuit that respondent

Lundell Manufacturing Company, Inc. ("Lundell") is not a public figure. As a result, despite Lundell's acknowledged failure to establish actual malice, Lundell was awarded more than $1 million in a libel suit about a matter of admitted public controversy.

The court of appeals reached its determination despite uncontroverted record evidence that Lundell touted its garbage recycling machine to a county government as the "solution" to the county's well-publicized and highly controversial garbage disposal problems and then voluntarily entered into a public contract with the county to provide the machine. The court essentially concluded that despite this highly public role on a topic of enormous public interest, because Lundell did not itself literally *speak* about the controversy, it could thus escape being characterized as a public figure.

The litigation arose from a July 2, 1992 broadcast on the ABC television network of "World News Tonight with Peter Jennings." The broadcast included one of a series of reports on "Anger in America," designed to explore " 'why people are frustrated or angered by government.' " (98 F.3d at 354; App. 2a) The report dealt with the reaction of citizens in rural Berrien County, Georgia (the "County") to the controversial issuance of millions of dollars in revenue bonds, without voter approval, to purchase a garbage recycling machine. The machine was designed to substitute for a rapidly filling public landfill site as a means of garbage disposal and was to pay for itself (and turn a profit for the public) from the collection of user fees and the sale of the recycled products it produced. Lundell manufactured the machine.

The record below established without dispute that, well before the ABC broadcast, there had been what the Berrien County Commission Chairman characterized as "a lot of publicity given to the [Berrien County] garbage problem." (R. 404) The County "made the papers more on garbage than the local murder trials," the Chairman testified, and "it was well

known throughout south Georgia that Berrien County was looking for somebody with a solution to the garbage problem." (*Id.*)

Lundell presented its machine, in its own words, as that "solution" and contracted to provide its product to the County in the midst of the already heated controversy as to disposal issues. (R. 288-89) Several dozen articles dealing with Berrien County's garbage problems—all drawn from Lundell's own contemporaneous news clippings file (R. 289-91)—are in the record (R. 1079-81, 1083-89, 1094-1104, 1106-1146); about half of these deal with the controversy which existed before Lundell chose to sell its garbage recycling machine to the County (R. 1109-1123, 1132-46).

Among the issues publicly debated prior to the ABC broadcast were (1) whether the Berrien County Commission Chairman who arranged for the County's purchase of the Lundell garbage recyling machine had received a commission from Lundell for the County's purchase and (2) the County Chairman's subsequent employment as a sales representative for Lundell (R. 944, 952) (the County Chairman denied the first allegation (R. 372-73, 376-77) and admitted the second (R. 376-77, 437)).

By the time ABC broadcast the report on the Berrien County garbage controversy, the purchase and use of the Lundell machine already had generated a taxpayers' lawsuit (App. 43a; R. 32-33), action by the State government to revoke the Berrien County recycling operation's permit (R. 957-58), and extensive state and local media coverage, much of which referred to Lundell and its machinery by name or description (R. 949-55, 1080-81, 1083-89, 1094-1104, 1106-07, 1109-23, 1125-46).

The ABC broadcast reported the fact that although "the machine turned the garbage into fuel pellets and compost" the plant proved to be far more expensive to operate than the County Commission predicted and was eventually shut down,

with citizens now paying both to retire the bonds for the Lundell machine and to haul their garbage to a landfill site in another county. (98 F.3d at 354-55; App. 3a-4a) The broadcast quoted the County Chairman who arranged the bond issue as stating that, " 'There's nothing physically wrong with the machine. It's the people,' " and that the machine was supposed to work like another Lundell machine in Tennessee by " 'paying for itself by selling the recycled garbage and charging user fees.' " (98 F.3d at 354; App. 3a) Notwithstanding these statements, Lundell's claim, as it reached the Eighth Circuit Court of Appeals, was that it was defamed by a single sentence in the overall report which stated: " 'In this south Georgia county of tobacco farms and pecan groves, taxpayers are angry that they are stuck with a three million dollar debt for this garbage recycling machine that they never approved and *does not work*.' " (98 F.3d at 354; App. 3a) Lundell contended that this sentence would be understood to mean the machine was not, as the other statements suggest, a financial failure, but rather mechanically inoperable.

A. The Opinions of the District Court

Lundell commenced this libel action in the United States District Court for the Northern District of Iowa on August 10, 1992. Jurisdiction was premised on diversity of citizenship. *See* 28 U.S.C. § 1332. By order filed April 13, 1994 (reprinted in the Appendix hereto at 42a-62a), the district court denied ABC's summary judgment motion and permitted the case to go to trial before a jury. At the close of plaintiff's evidence, the court held, as a matter of law, that ABC had not acted with actual malice in connection with the July 2, 1992 broadcast. (The transcript of the district court ruling granting a directed verdict to ABC on plaintiff's inability to prove actual malice, rendered on May 13, 1994, is reprinted in the Appendix hereto at 38a-41a.) The district court concluded that the record evidence established "that there could not have been a high degree of awareness of the probable falsity of statements published concerning whether the [Lundell]

machine worked." (App. 40a-41a) Notwithstanding the absence of actual malice, the court allowed the case against ABC to proceed because the court concluded that "Lundell is a private-figure plaintiff." (App. 41a) The jury thereafter returned a verdict of $1,058,000 against ABC.

By order filed September 28, 1995 (reprinted in the Appendix hereto at 27a-37a), the district court granted ABC's motion for judgment as a matter of law. The court concluded that the ABC broadcast was "substantially true" because "[i]n context, the ABC story stated that Lundell's machine in Berrien County, Georgia was supposed to work like the Lundell machine in Tennessee which paid for itself by selling recycled fuel pellets and charging user fees" and that this had not occurred. (App. 34a) The court also again concluded that Lundell "is a private-figure plaintiff as it has never thrust itself into public controversy," and "never attempted to influence the outcome of the public controversy in Berrien County, Georgia." (App. 30a)

B. The Court of Appeals Decision

In an opinion rendered on October 15, 1996 (reported at 98 F.3d 351 and reprinted in the Appendix hereto at 1a-26a), a panel of the Eighth Circuit reversed the grant of judgment as a matter of law to ABC and reinstated the million dollar judgment for Lundell. The court rejected, *inter alia*, the district court's role in determining substantial truth. (98 F.3d at 360-61; App. 15a-16a) The court of appeals determined that notwithstanding ABC's contention and the district court's conclusion that the broadcast was substantially true in reporting that the machine did not work as planned, *i.e.*, was not financially viable, there was "substantial evidence from which a reasonable jury could conclude that the statement was false, and . . . conclude that the sting of the story was that the Lundell machine was mechanically inoperable." (*Id.*) (The court did not question the reality that the machine did not work in the sense that it failed to achieve financial viability and had been shut down.)

Without challenging the finding of the district court that Lundell had failed to prove that ABC had broadcast its report with actual malice, the Eighth Circuit panel rejected the proposition that Lundell was a public figure. In a two-step public figure analysis, the court determined, first, that "the particular controversy giving rise to ABC's report was the garbage disposal problem in Berrien County" and acknowledged that the controversy was "clearly a public controversy involving questions of 'public concern.'" (98 F.3d at 363; App. 20a)

The court then addressed "the 'nature and extent' of Lundell's involvement" in the controversy, concluding that "[a]lthough Lundell contracted with the county for the sale of the machine" and that the sale was a subject of heated controversy, Lundell had not thereby "placed itself into the controversy to influence the issues involved." (98 F.3d at 363-64; App. 20a-22a) In so ruling, the court made no mention of Lundell's knowledge of the heated public controversy concerning garbage disposal in Berrien County at the time it sought and obtained a contract with the County to address that problem. Nor did the court refer to the numerous articles in evidence describing Lundell generally or by name included in Lundell's own extensive news clippings file on the controversy. Instead, relying on *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979), the court simply concluded that "ABC cannot, by its own conduct, create its own defense by making Lundell a public figure." (98 F.3d at 364; App. 22a)[1] The court also con-

[1] Notwithstanding this statement concerning ABC's asserted effort to make Lundell a public figure by its own conduct, elsewhere in the opinion the court noted that ABC began investigating the subject only after its journalist reviewed a story in the *Atlanta Constitution* (98 F.3d at 361; App. 16a). That story specifically described the Berrien County bond scheme, the losses incurred in connection with the Lundell recycling machine and the subsequent employment of the County Commission Chairman who arranged the bond deal as a salesman for the machine's manufacturer—Lundell. In addition, of course, the record included numerous articles about Lundell and its machine which predated the ABC broadcast.

cluded that Lundell lacked access to the press, apparently on the basis of ABC's refusal to broadcast a retraction of the report at issue. (*Id.*)

By order dated November 26, 1996 (reprinted in the Appendix hereto at 63a), the court of appeals denied ABC's petition for rehearing and suggestion for rehearing *en banc* which had focused on the public figure issue, with Chief Judge Richard S. Arnold and Judges McMillian and Murphy voting to grant *en banc* review.

REASONS FOR GRANTING THE WRIT

WITHOUT THE GUIDANCE OF THIS COURT, A SPLIT AMONG THE CIRCUITS WILL CONTINUE TO PRODUCE UNPREDICTABLE RESULTS AS TO WHETHER A PARTY THAT HAS PLACED ITSELF AT THE CENTER OF AN ONGOING PUBLIC CONTROVERSY MAY AVOID PUBLIC FIGURE STATUS SIMPLY BY DECLINING TO SPEAK TO THE PRESS

In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court concluded that the key to determining whether a party is a limited-purpose public figure in connection with deciding the standard of fault in a defamation action is "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352. Individuals who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" are limited-purpose public figures. *Id.* at 345. This Petition asks the Court to resolve a split among the circuit courts of appeals as to whether the requisite "participation" for public figure status requires the plaintiff literally to *speak* on a pre-existing public controversy or whether it may be premised more broadly on a plaintiff's own voluntary conduct in placing itself into the center of such con-

troversy. Put another way, can a corporate plaintiff which has voluntarily entered a raging public controversy by its sales and promotional efforts directed to that controversy avoid public figure status simply by avoiding comment?

While *Gertz* itself does not explicitly answer the question, the emphasis in *Gertz* on "participation" suggests that a "no comment" or its equivalent by a figure who has voluntarily thrust itself into a public controversy should not allow a libel plaintiff to "opt out" of limited-purpose public figure status in this fashion.

The significance of this issue is magnified when the plaintiff, as here, accepted public funds to address public needs. Allowing such a plaintiff to escape the deliberately heavy burden of the actual malice standard threatens to dampen discussion of the role of some of the most significant participants in public affairs.

The differing impact of the public/private figure dichotomy is well illustrated by this very case. Were the plaintiff classified as a public figure, this case would be dismissed since it is now undisputed that ABC acted without actual malice. Because the plaintiff was deemed instead a private figure, the report was held to give rise to liability under a negligence standard in light of the Eighth Circuit's ultimate rejection of the district court's ruling that the broadcast was substantially true.

In a world in which privatization of governmental functions is becoming ever more prevalent, reporting on the participation of corporations which voluntarily thrust themselves into public controversies by seeking to replace public functions should be entitled to the "breathing space" afforded by the public figure standard. The press should not be subjected to the hair-splitting substantial truth analysis sanctioned by the court of appeals as a result of its adoption of a private figure standard here.[2]

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[2] Issues as to substantial truth and independent review were raised below along with the public figure issues. Because of the fact-bound

More than two decades after *Gertz*, the courts of appeals remain divided on the public figure question described above, as well as broader public figure issues. That this Court still "has not definitively picked a standard for defining 'public figures,' " *Harris* v. *Quadracci*, 48 F.3d 247, 251 n.6 (7th Cir. 1995), is not in dispute. But without clearly articulated standards from this Court addressed to the discrete and fundamental issue posed by this Petition, the lower federal and state courts will continue to find the task of distinguishing between public and private figures not appreciably different from " 'trying to nail a jellyfish to the wall.' " *Snead* v. *Redland Aggregates Ltd.*, 998 F.2d 1325, 1329 (5th Cir. 1993), *cert. dismissed*, 114 S. Ct. 1587 (1994). And—as the conflicting approaches of the circuits reflected on this issue illustrate—they will continue to render inconsistent and conflicting opinions leading to the very "unpredictable results and uncertain expectations" that *Gertz* was intended to avoid. *See* 418 U.S. at 343.

A. A Split Among The Circuits Exists As To Whether The *Gertz* Requirement of "Participation" In A Controversy Requires A Potential Public Figure Itself To Speak Out On The Controversy

In its opinion below, the Eighth Circuit concluded that a plaintiff could enter what the court acknowledged to be "clearly a public controversy involving questions of 'public concern,' " while avoiding limited-purpose public figure status simply by eschewing comment on the matters at issue. (98 F.3d at 363-64; App. 20a-22a) In the view of the Eighth Circuit, neither the extent of a plaintiff's deliberate course of conduct in involving itself in a pre-existing public controversy, nor the centrality of its role in that controversy, is of moment if the plaintiff does not choose literally to debate the issues.

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character of the first two issues in this context this Petition seeks review only with respect to the case-dispositive public figure questions.

The fundamental error of that view is illustrated by the Eighth Circuit's belief that it was compelled by this Court's decision in *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979). In *Hutchinson*, the Court held that the defendant could not himself turn a relatively obscure research scientist into a public figure by publicizing a mock award that ridiculed federal spending on the scientist's research. Unlike this case, in *Hutchinson* there was no pre-existing public controversy into which the plaintiff had voluntarily thrust himself; indeed, in *Hutchinson* there was no public controversy at all prior to the publicity engendered by that *defendant's* conduct. That is precisely the opposite situation from that presented here.

Under the Eighth Circuit's constricted holding, even a company that deliberately thrusts itself into a public controversy by promoting and selling its product to local government as a "solution" to the pre-existing controversy—as Lundell Manufacturing Company did—does not become a public figure for the limited purpose of public discussion about its product unless the company chooses literally to speak about the issues under debate. And this is true even if it acts—as Lundell indisputably did—with full knowledge of the controversy.

A similar rule to that adopted in this case by the Eighth Circuit has been followed by the Tenth Circuit. In *Lawrence* v. *Moss*, 639 F.2d 634 (10th Cir.), *cert. denied*, 451 U.S. 1031 (1981), that circuit held that a political operative who had worked in a policy-making role for Vice President Spiro Agnew, and served as a fundraiser in various campaigns, was not a public figure in connection with his consulting and fund-raising work for then Senatorial aspirant Orrin Hatch in a campaign against the incumbent. The court of appeals gave controlling weight to the fact that plaintiff Lawrence, notwithstanding the significance of his role, "made no speeches and no radio or television appearances and did not write for public consumption." *Id.* at 637.

It is plain, however, that the result reached in the present case as to limited-purpose public figure status would not have been reached in other circuits.

Both the Third and Fifth Circuits have rejected the Eighth and Tenth Circuit rule that the voluntariness of a plaintiff's participation in the particular controversy is measured only by demonstrated efforts to speak to the issues underlying the controversy. As the Third Circuit has made clear,

> "the voluntariness requirement [for limited-purpose public figure status] may be satisfied even though an individual does not intend to attract attention by his actions. When an individual undertakes a course of conduct that *invites* attention, even though such attention is neither sought nor desired, he may be deemed a public figure."

McDowell v. *Paiewonsky*, 769 F.2d 942, 950 (3d Cir. 1985) (emphasis added).

In *McDowell*, the Third Circuit rejected the very analysis adopted by the Eighth Circuit. The Third Circuit held that an architect, who had successfully bid on a public building project knowing its controversial nature, was a limited-purpose public figure as to his participation in the project and could not escape public figure status simply because he wished not to be one. *Id.* at 949-50. The architect in *McDowell* was held to be "quite different from the relatively unknown research scientist in Hutchinson" because, at the time of the challenged broadcast, the architect's work on government projects "had been the subject of considerable media attention." *Id.* at 949.

The Third Circuit's approach—unlike that of the Eighth Circuit—recognizes that if a plaintiff's voluntary actions are of sufficient centrality to a public controversy, it is of no moment that the plaintiff did not desire such public figure status. *See also Marcone* v. *Penthouse International Magazine for Men*, 754 F.2d 1072, 1083 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) ("[T]he plaintiff's action may itself invite comment and attention, and even though he does not directly try

or even want to attract the public's attention, he is deemed to have assumed the risk of such attention.").

The Fifth Circuit has been equally emphatic on this point: "While an individual can achieve public-figure status by aggressively seeking public attention or by exercising his access to the media, an individual cannot erase his public-figure status by limiting public comment and maintaining a low public profile." *Trotter* v. *Jack Anderson Enterprises, Inc.*, 818 F.2d 431, 435-36 (5th Cir. 1987). In that case, the Fifth Circuit held that Trotter, the president of a corporation embroiled in a violent labor dispute, was a public figure for the limited purpose of public discussion of the anti-union violence even though he had not actively sought out public attention and his name had not appeared frequently in the press. Although Trotter urged that he lacked access to the press (and the opinion recounts no statements made by him to the press), Trotter's "sufficient involvement" in the labor controversy was itself enough to impose public figure status on him "whatever the quantity of his public statements." 818 F.2d at 436. *See also Rosanova* v. *Playboy Enterprises, Inc.*, 580 F.2d 859, 861 (5th Cir. 1978) ("It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be. It is sufficient, . . . that '[plaintiff] voluntarily engaged in a course that was bound to invite attention and comment.' ").[3]

The District of Columbia Circuit has adopted a formal test that would likely lead to results in accord with the approach of the Third and Fifth Circuits. In *Waldbaum* v. *Fairchild Publications, Inc.*, 627 F.2d 1287, 1298 & n.34 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980), that circuit adopted a

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[3] *See also* Rodney A. Smolla, *Law of Defamation* § 2.13[2], at 2-40 (1996) ("But just as the media is not permitted to bootstrap itself into creating its own defense by focusing attention on the plaintiff through the very speech alleged to be defamatory, the plaintiff is not permitted to avoid the strictures of the actual malice standard by protesting 'I didn't want the attention.' ").

three-part public figure test that requires that (1) the controversy be public both in the sense that people are discussing it and that persons beyond the immediate participants are likely to feel the impact of its resolution; (2) the plaintiff have more than a trivial or tangential role in the controversy; and (3) the alleged defamation be germane to the plaintiff's participation in the controversy. *Id.* at 1296-98. Under the *Waldbaum* test, a plaintiff need only have played a "sufficiently" central role in the public controversy to be accorded public figure status for the limited purpose of discussion about that controversy. *Clyburn* v. *News World Communications, Inc.*, 903 F.2d 29, 33 (D.C. Cir. 1990) (plaintiff held to be a public figure where he "engaged in conduct that he knew markedly raised the chances that he would become embroiled in a public controversy"); *see also Trotter*, 818 F.2d at 436 (where the Fifth Circuit adopted the *Waldbaum* test).[4]

The uncertainty engendered by the split among the circuits as to the public figure status of one who, while a central actor in a public controversy, declines to speak out constricts the ability of the news media to ensure fulfillment of the First Amendment imperative "that debate on public issues . . . be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). As *Gertz* recognized, it is

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[4] "[B]ecause the Supreme Court [still] has not defined the precise contours of who constitutes a 'public figure,' " *Harris*, 48 F.3d at 250 n.5, the *Waldbaum* formulation has been denominated as the "federal analysis" by some courts, *see id.* at 251, and has been been adopted by a number of state courts, *see, e.g.*, *Mount Juneau Enterprise, Inc.* v. *Juneau Empire*, 891 P.2d 829, 836 (Alaska 1995); *Copp* v. *Paxton*, 45 Cal. App. 4th 829, 845-46, 52 Cal. Rptr. 2d 831, 844 (Cal. Ct. App. 1996), *review denied* (Cal. Aug. 14, 1996); *Hunter* v. *Hartman*, 545 N.W.2d 699, 704 (Minn. Ct. App. 1996), *review denied* (Minn. June 19, 1996). *But see Clardy* v. *Cowles Publishing Co.*, 912 P.2d 1078, 1083-84 (Wash. Ct. App. 1996) (rejecting *Waldbaum* formulation). In the opinion below, the Eighth Circuit applied the *Waldbaum* formula for determining the existence of a "public controversy" (98 F.3d at 363; App. 20a), but adopted its own *ad hoc* standard for assessing Lundell's role in the controversy, *i.e.*, demonstrated effort literally to speak on the issues.

important to provide rules that can avoid "unpredictable results and uncertain expectations." 418 U.S. at 343. That can only occur when this Court resolves the conflict between the circuits presented by this Petition.

B. The Court Should Adopt A Standard That Recognizes The Public Figure Status Of Both Speakers And Other Participants In Public Controversies

Under *Gertz*, Lundell should be considered a public figure because it voluntarily and purposefully "thrust [itself] to the forefront of [a] particular public controvers[y] in order to influence the resolution of the issues involved." 418 U.S. at 345. Lundell entered the long-standing and well-publicized Berrien County garbage disposal controversy after promoting and advertising its recycling machine as "the latest and best technology for handling garbage throughout the world." (R. 288) It knew that sales of the machine itself had evoked media coverage and it amassed a contemporaneous collection of news stories about Berrien County's garbage disposal problems before it chose to sell its machine to that County. (R. 288-91)

When Lundell subsequently offered and sold its product to the County government as a "solution" to the County's garbage disposal problems (R. 129, 167-68, 288), it chose a course of conduct that it had to know would invite public attention and comment. It is undisputed that, in the words of the Berrien County Commission Chairman, the County "made the papers more on garbage than the local murder trials." (R. 404) Lundell further ensured its position in the public eye by hiring as a sales representative the very Berrien County Commission Chairman who had approved the County's publicly financed purchase of the Lundell machine. (R. 376-77, 437, 944, 952) That Lundell did not choose to comment itself on the issues involved in the "garbage disposal problem in Berrien County" (98 F.3d at 363; App. 20a)—or publicly debate the County's controversial public financing of the Lun-

dell machine—does not detract from Lundell's very prominent role in this very public controversy.

The Eighth Circuit's contrary analysis leads to results that are at odds with the principles that underlie the *Gertz* recognition that participants in public controversies are to be treated differently from those who had no such role. Dow Chemical Company, for example, would have been deemed a private figure under the Eighth Circuit approach with respect to public debate about the use of napalm during the Vietnam War if Dow did not itself publicly comment about its manufacture and supply of the chemical to the U.S. Government for use during the Vietnam War. A studied "no comment" would have avoided limited-purpose public figure designation, even though "[p]erhaps more than any other word associated with the Vietnam conflict, napalm came to define the sides in a bitter national—and international—debate." Tony Perry, *Waging a Low-Key War on Napalm*, Los Angeles Times, Dec. 3, 1994, at A-1.

In the absence of a standard that recognizes the public figure status of a participant in a particular public controversy because of its voluntary conduct which places it at the heart of a pre-existing public debate, such results would be inevitable. Such results would also be facially inconsistent with the rationale of *Gertz* which recognized the press' need for "breathing space" in reporting about those who have voluntarily involved themselves in matters of public controversy.

C. It Is Particularly Important To Provide The Press With The Breathing Space Provided By The Public Figure Standard When, As Here, A Plaintiff By Its Conduct Has Invited Public Attention And Assumed The Risk Of Media Scrutiny

In *Gertz*, this Court stressed that "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood con-

cerning them." 418 U.S. at 345. That assumption is justified because public figures like public officials have assumed the risk of such media exposure by themselves "invit[ing] attention and comment." *Id.* The Eighth Circuit disregarded this important normative consideration in concluding that Lundell was not a public figure for the limited purpose of public discussion about the garbage recycling machine it promoted and sold to Berrien County as a solution to the County's ongoing garbage problems.[5]

The notion that businesses and consultants that market and sell their products and services assume the risk of public scrutiny and media exposure has particular force when those

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[5] The assumption of the risk rationale underlying *Gertz* and its progeny has been applied by many other courts which—unlike the Eighth Circuit—accord public figure status to businesses that advertise and market their products and services. *See, e.g., Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d 264, 273-74 (3d Cir. 1980) (by advertising its products, corporation invites public attention, comment and criticism and thereby acquires limited-purpose public figure status); *National Foundation for Cancer Research, Inc.* v. *Council of Better Business Bureaus, Inc.*, 705 F.2d 98, 101-02 (4th Cir.) (charity deemed public figure because it "thrust itself into the public eye" through advertising and solicitation campaign), *cert. denied*, 464 U.S. 830 (1983). Even under the rationale of some courts that have refused to base public figure status on a business plaintiff's advertising efforts alone, Lundell would qualify as a public figure. *See, e.g., Golden Bear Distributing Systems of Texas, Inc.* v. *Chase Revel, Inc.*, 708 F.2d 944, 952 (5th Cir. 1983) (business plaintiff not public figure merely by advertising its services; there must be "pre-existing public controversy"). At least one court applies an actual malice standard when a company's products and services intrinsically implicate important public issues, such as public health. *Dairy Stores, Inc.* v. *Sentinel Publishing Co.*, 516 A.2d 220, 229-30 (N.J. 1986) (applying New Jersey law). As one commentator has observed: "Although it is not entirely clear where the weight of authority lies, someone doing business in the public marketplace should be considered 'public' to the extent for purposes of comment about that activity. A public business does, indeed, volunteer goods or services for public evaluation and criticism, which comports with the common-law concept of public figure for purposes of applying the 'fair comment' privilege." Robert D. Sack & Sandra S. Baron, *Libel, Slander, and Related Problems* 268-69 (2d ed. 1994).

products and services are marketed and sold to the government itself, for purchase with public funds, as a solution to a pre-existing public controversy. In *McDowell*, for example, the Third Circuit held that the plaintiff's decision to accept a controversial public assignment "almost inevitably put him into the vortex of a public controversy. Just as a professional athlete or coach must accept the attendant publicity surrounding his decision to assume his position, so must plaintiff accept the consequences of his decision." 769 F.2d at 950 (footnote omitted).[6]

As the Third Circuit approach correctly recognizes: " 'The purpose of the First Amendment would be frustrated if those persons and activities that most require public scrutiny could wrap themselves in a veil of secrecy and thus remain beyond the reach of public knowledge.' " *Id.* (*quoting Marcone*, 754 F.2d at 1086).

The need for "breathing space" for a vigorous press, rooted in constitutional concerns, is especially crucial today in light of the accelerating trend toward privatization of federal, state and local government services.[7] Government functions are

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[6] Other courts also have held that private businesses and consultants who accept public work are limited-purpose public figures. *E.g.*, *Reuber* v. *Food Chemical News, Inc.*, 925 F.2d 703, 708-09 (4th Cir. 1991) (*en banc*) (scientist employed by private firm under public contract with National Cancer Institute was limited-purpose public figure), *cert. denied*, 501 U.S. 1212 (1991); *Clyburn*, 903 F.2d at 31 (owner of consultant firm which frequently contracted with D.C. government was limited-purpose public figure); *Nicholson* v. *Promotors on Listings*, 159 F.R.D. 343, 349 (D. Mass. 1994) (independent consultant hired by city government). Indeed, the Fourth Circuit has suggested that "[t]here well may be circumstances in which a consultant employed by a government entity could be classified as a public official." *Arctic Co.* v. *Loudoun Times Mirror*, 624 F.2d 518, 522 (4th Cir. 1980) (dicta), *cert. denied*, 449 U.S. 1102 (1981).

[7] " 'The federal government, in fact, has privatized far more functions than most Americans realize,' " according to the conclusions of political scientists John J. DiIulio, Jr. and Donald F. Kettl in their 1995

increasingly performed by those who are not "public officials" and who, if they simply avoid comment, would not be public figures under the Eighth Circuit's standard, whatever their actual involvement in the framing or resolution of public controversies. This would have an extraordinarily inhibiting effect on the "robust" and "uninhibited" debate the First Amendment is intended to foster. *New York Times Co.* v. *Sullivan*, 376 U.S. at 270.

Private businesses, of course, are not directly accountable to the public. This lack of public accountability—on the part of entities increasingly granted authority to "solve" social problems formerly addressed by government entities—has raised growing concern that the "watchdog role" of the press will be undermined because of its inability "to adequately monitor corporate managers of the public weal." Bill Kovach, *When Public Business Goes Private*, The New York Times, Dec. 4, 1996, at A-29. As the facts of the present case may well demonstrate, "if not watched closely and measured carefully, privatization and outsourcing can lead to extravagant cost overruns and shoddy public services." Peter Behr, *Solving the Privatization Puzzle*, The Washington Post, Feb. 13, 1995, at F-01. Yet the Eighth Circuit decision will discourage all but the boldest members of the press from reporting freely on the entities that are playing ever more meaningful roles in public controversies.

Brookings Institution report. David Wessel, *The American Way? In the U.S., Ideology and Budget Concerns are Feeding the Privatization Fever. But Are We Going Too Far?*, The Wall Street Journal, Oct. 2, 1995. For example, the Department of Energy contracts out nearly its entire nuclear-bomb-manufacturing operations, from design through production and cleanup. *Id.* On the local level, " '[t]here's not a single type of service that a local government is providing that isn't privatized somewhere,' " from garbage collection and garbage recycling to hospitals and highways to schools and skating rinks. Richard Wolf, *Local Governments Discover Competition is Key to Reducing Costs*, USA Today, June 22, 1995.

Treating a company such as Lundell as a public figure is particularly fair and just when it seeks to profit from its dealings with government. Private contractors know that certain burdens are a concomitant of public work. When they contract with the federal government they know, for example, they must make available "upon request" information pertaining to compliance with affirmative action requirements. 41 C.F.R. § 60-1.40(c) (1996). When they enter into defense contracts, they know they must open their "books, documents, papers, and records" to government auditors. 22 U.S.C. § 2586 (1994).

Similarly, when a company such as Lundell advertises and sells its product to government as the "solution" to a raging public controversy, and that product is paid for with public monies, the company must accept "certain necessary consequences of that involvement in public affairs." *See Gertz*, 418 U.S. at 344.

By voluntarily engaging in a course of conduct that inevitably places them in the public eye—and which *should* lead to greater public scrutiny—such businesses invite public attention and comment and thereby "voluntarily expose[ ] themselves to increased risk of injury from defamatory falsehood concerning them" (*Gertz*, 418 U.S. at 345). Corporations which undertake to replace services traditionally supplied by the government and in doing so thrust themselves into a preexisting controversy should not be immune from the searching scrutiny the public figure standard is designed to foster.[8]

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[8] Some courts have concluded that since the "reputational interests of . . . corporations is *de minimis* compared to the reputational interests of [an individual]," a corporation, by definition, is a public figure. *Jadwin* v. *Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 487-88 (Minn. 1985); *Martin Marietta Corp.* v. *Evening Star Newspaper Co.*, 417 F. Supp. 947, 955-56 (D.D.C. 1976). *See also* Rodney A. Smolla, *Law of Defamation* § 2.24[2], at 2-82 & n. 495 (1996) ("The impersonal nature of a corporation is thus a factor militating in favor of treating corporations as public figures, since corporate reputation is arguably of less significant social importance than the interests in human dignity protected by defamation rules for natural individuals.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
February 21, 1997

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Submitted April 10, 1996 Decided Oct. 15, 1996

No. 95-3473

LUNDELL MANUFACTURING COMPANY, INC.,

Plaintiff-Appellant,

—v.—

AMERICAN BROADCASTING COMPANIES, INC.,

Defendant-Appellee.

Rehearing and Suggestion for Rehearing En Banc
Denied Nov. 26, 1996*

Paul Dean Lundberg, argued, Sioux City, IA, *for plaintiff-appellant.*

Kasey W. Kincaid, argued, Des Moines, IA, *for defendant-appellee.*

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* Chief Judge Richard S. Arnold, Judge McMillian, and Judge Murphy would grant the suggestion. Judge Magill took no part in the consideration or decision of this case.

Before

WOLLMAN, JOHN R. GIBSON, and HANSEN,
Circuit Judges.

JOHN R. GIBSON, *Circuit Judge*.

Lundell Manufacturing Company appeals from the district court's order granting American Broadcasting Companies judgment as a matter of law, and setting aside a jury verdict of just over one million dollars for Lundell on its libel action. ABC broadcast a story on "World News Tonight with Peter Jennings," reporting that a garbage recycling machine manufactured by Lundell "does not work." Lundell sued for libel, a jury returned a verdict in its favor, and the district court set aside the jury verdict. On appeal, Lundell argues that the district court erred in setting aside the jury verdict because there was substantial evidence that the "sting" of the defamatory statement was false. Lundell also contends that the court erred in setting aside the lost profits award because there was evidence of lost profits damages. We reverse.

On July 2, 1992, ABC broadcast a story on "World News Tonight with Peter Jennings" as part of the program's continuing "Anger in America" reports. Jennings introduced the story:

> Our final report tonight is about garbage, which in the case of a small rural county in Georgia, is making an awful lot of people angry. What we have here is another example of why people are frustrated or angered by government.

ABC reporter, Rebecca Chase, began the story by explaining the predicament of Berrien County taxpayers. An on-

screen graphic labeled "Garbage Tax" appeared at the beginning of the story, and Chase began her report:

> In this south Georgia county of tobacco farms and pecan groves, taxpayers are angry that they are stuck with a three million dollar debt for this garbage recycling machine that they never approved and *does not work*.

(Emphasis added).

The story continued with Chase interviewing an upset taxpayer, and then describing the background of the controversy:

> In 1988, Berrien County had no place to put its garbage because the landfill was full. So the county commission decided to buy this garbage machine with revenue bonds which do not require voter approval.

As Chase made this statement, television viewers saw a corresponding video showing the Lundell machine in Berrien County.

Further in the story, viewers were shown another recycling machine sorting solid waste as Chase stated:

> The machine was supposed to work like this one in Tennessee, sorting and recycling up to ninety percent of the county's garbage and paying for itself by selling the recycled materials and charging user fees. That is how then-commissioner Joe Stallings promised it would work here. It did not.

Chase then interviewed the former Commissioner, Joe Stallings, who stated: "There's nothing physically wrong with the machine. It's the people."

Chase continued:

> Stallings blames people for not giving the machine a chance. But most people here blame him for misleading them about how much it cost to operate the plant. It was five times more expensive than he said it would be. The machine turned the garbage into fuel pellets and compost, but no one found a buyer. So the unsold material

> piled up outside—nothing more than exposed trash. The state has now ordered the plant shut down as an environmental hazard.

The story then detailed citizen responses, including a class action lawsuit to void the taxpayers' obligation to pay for the recycling project. The story concluded by telling that Berrien County taxpayers now must have their garbage hauled to another county for disposal.

Lundell sued ABC, alleging that the statement that the recycling machine "does not work" falsely implied that the recycling machine was not mechanically operable.[1] ABC concedes that the recycling machine was mechanically sound, and that the reason Berrien County no longer used the machine was because the county could not sell the by-products at a price sufficient to cover the machine's operating expenses. ABC defends the statement, arguing that the phrase "does not work" accurately implied that the Lundell machine and Berrien County's recycling plan did not work as intended or promised because the system did not work in a financially viable manner.

ABC filed a motion for summary judgment, arguing that Lundell could not demonstrate that the statement that the machine "did not work" was false, and that the challenged statement was not actionable because it was substantially true. The district court ruled that Lundell must bear the burden of proving that the challenged statement was false. *See In re IBP Confidential Business Documents Litigation*, 797 F.2d 632, 647 (8th Cir.1986) (en banc), *cert. denied,* 479 U.S. 1088, 107 S.Ct. 1293, 1294, 94 L.Ed.2d 150 (1987). The court recognized, however, that even if the statement was false, Lundell could not recover for defamation if the "gist" or "sting" of the report was substantially true. *See Behr v. Meredith Corp.*, 414

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[1] Lundell also alleged that two other statements in the story were defamatory: the statement that "no one found a buyer" for the fuel pellets produced by the machine, and the statement that "taxpayers are now forced to have their trash hauled to another county's landfill." The district court dismissed both of these claims, and Lundell does not raise these issues on appeal.

N.W.2d 339, 342 (Iowa 1987). Nevertheless, the court denied ABC's motion, holding that a disputed question of fact existed as to the "sting" of the report and, therefore, the jury must decide the question. At the close of Lundell's evidence, the court directed a verdict for ABC on Lundell's claim of actual malice. The court concluded that Lundell was a "private figure plaintiff" and, therefore, must show by a preponderance of the evidence that ABC breached the standard of care of reasonably prudent professional broadcast news employees in broadcasting the report. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 94 S.Ct. 2997, 3010-11, 41 L.Ed.2d 789 (1974); *Jones v. Palmer Communications, Inc.*, 440 N.W2d 884, 898 (Iowa 1989).

Following an eight-day trial, the jury returned a verdict for Lundell assessing $900,000 in damages for injury to reputation and $158,000 in damages for lost profits. Later, the court granted ABC's renewed motion for judgment as a matter of law, ruling that the news report was substantially true as a matter of law. The court also ruled that if it had not entered judgment as a matter of law, it would have set aside the $158,000 lost profits award because of insufficient evidence. Lundell appeals.

I.

A critical dispute in this case is over our standard of review. Lundell argues that there is substantial evidence that ABC's statement that the machine did not work is false, and, therefore, the court could not decide that the report was substantially true as a matter of law, and neither the district court nor this court can disturb the jury's finding.

Lundell argues that we are guided by our usual standard for reviewing a district court's decision to enter judgment as a matter of law. Under that standard, we ask whether there is sufficient evidence to support a jury verdict. *White v. Pence*, 961 F.2d 776, 779 (8th Cir.1992) (standard for granting a motion for judgment as a matter of law). We analyze the evidence in the light most favorable to Lundell, and we do not

weigh or evaluate the evidence or consider questions of credibility. *Id.* To sustain a motion for judgment as a matter of law, all the evidence must point one way and be susceptible of no reasonable inference sustaining Lundell's position. *Id.*

ABC, on the other hand, contends that we are not restrained in this First Amendment case by the deference ordinarily accorded jury findings. Citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), ABC argues that we must "make an independent examination of the whole record," unrestrained by the deference ordinarily afforded to the jury, in order to ensure that no "forbidden intrusion on the field of free expression" has occurred. *Id.* at 285, 84 S.Ct. at 729 (internal quotation and citation omitted).

To remove the chilling effect of defamation laws and to encourage "uninhibited, robust, and wide-open" debate, the Supreme Court created a constitutional rule protecting the good faith criticism of government officials in *New York Times*, 376 U.S. at 270-71, 84 S.Ct. at 720-21. Because freedoms of expression require "breathing space," *id.* at 272, 84 S.Ct. at 721-22, the Court held that the Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.' " *Id.* at 279-80, 84 S.Ct. at 725. Actual malice is a statement made "with knowledge that it was false or with reckless disregard of whether it was false." Id. at 280, 84 S.Ct. at 726. To ensure no forbidden intrusion on these First Amendment liberties, an appellate court's review of a trial court's finding of actual malice is not controlled by the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498-511, 104 S.Ct. 1949, 1958-65, 80 L.Ed.2d 502 (1984). "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' " *Id.* at 511, 104 S.Ct. at 1965.

The Supreme Court examined the protection for media defendants in suits brought by private individual in *Gertz*, 418 U.S. 323, 94 S.Ct. 2997. The Court determined that the *New York Times*' actual malice standard was inappropriate in suits brought by private persons attempting to prove injury to their reputation on a matter of public interest. *Id.* at 344-47, 94 S.Ct. at 3009-11. The Court nevertheless imposed two other constitutional limitations. First, the Court held that the states could not impose liability without fault. *Id.* at 346-47, 94 S.Ct. at 3010-11. Thus, a private figure cannot recover against a media defendant without showing that the statement at issue was false and the media defendant was at fault in publishing the statement. *Id.* at 347, 94 S.Ct. at 3010-11. Second, the Court held that the states could not permit recovery of presumed or punitive damages without a showing of actual malice. *Id.* at 349-50, 94 S.Ct. at 3011-12.

ABC argues that *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), made the finding of falsity a constitutional rule requiring us to independently review the record to determine whether there has been any "forbidden intrusion on the field of free expression." *New York Times*, 376 U.S. at 285, 84 S.Ct. at 729.

In *Philadelphia Newspapers*, a series of newspaper articles linked the plaintiffs to organized crime. The Court decided that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern. 475 U.S. at 777, 106 S.Ct. at 1564. After examining the case law concerning the constitutional limits on defamation suits, the Court explained:

> When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. *When the speech is of public concern but the plaintiff is a private figure, as in Gertz, the Constitution still supplants the standards of the common law, but the constitutional requirements are,*

> *in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern.* When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet* [*v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985)] the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.

Id. at 775, 106 S.Ct. at 1563 (emphasis added).

The Court emphasized that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." *Id.* at 777, 106 S.Ct. at 1564.

From this language in *Philadelphia Newspapers*, ABC argues that the findings of falsity and substantial truth are subject to constitutional rules requiring this court to independently evaluate the findings in a suit brought by a private figure against a media defendant. ABC contends that we cannot focus on the literal truth or falsity of the statement, but rather we must decide whether the challenged statement meets the constitutional requirements of a false statement. "Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' " *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 111 S.Ct. 2419, 2433, 115 L.Ed.2d 447 (1991) (quoting *Heuer v. Kee*, 15 Cal.App.2d 710, 59 P.2d 1063, 1064 (1936)). A statement is not false unless "it would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* (internal quotation omitted).

Lundell responds that the independent review mandated in *New York Times* only applies to a lower court finding of actual malice, and not to findings of falsity or substantial truth. Lundell argues that the issues of falsity and substantial truth are simply not controlled by the "constitutional rule" set forth in *New York Times*. Lundell points out that the court correctly instructed the jury on the false statement requirement and

ABC's defense of substantial truth, and we cannot overturn the findings of the jury.

There is no question that the independent review required by *New York Times* applies to a trial court finding of actual malice. 376 U.S. at 284-86, 84 S.Ct. at 728-29. *Accord Bose Corp.*, 466 U.S. at 514, 104 S.Ct. at 1967 ("We hold that the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times Co. v. Sullivan*."). Here, however, we are not reviewing a finding of actual malice. The district court categorized Lundell as a private figure plaintiff. Thus, the issue boils down to whether findings of falsity or substantial truth are constitutional rules requiring us to independently evaluate the record.

When the Court in *Philadelphia Newspapers* discussed overriding the common law because of First Amendment protections, it focused on the allocation of the burden of proof. *See* 475 U.S. at 777, 106 S.Ct. at 1564. The Pennsylvania Supreme Court, reversing the trial court, held that a Pennsylvania statute placed the burden of proving truth on the publisher, and that this did not violate the Federal Constitution. *Id.* at 770-71, 106 S.Ct. at 1561-62. The Supreme Court reversed, holding that the common-law presumption that defamatory speech is false is unconstitutional when a plaintiff seeks damages against a media defendant for speech of public concern. *Id.* at 777, 106 S.Ct. at 1564. The Court identified the burden of proof, not the element of falsity, as the constitutional requirement. To decide the case, the Court only held that the Constitution placed the burden of proving falsity on the plaintiff. Indeed, the Court emphasized that it did not consider what quantity of proof of falsity that a private figure plaintiff must present to recover. *Id.* at 779 n. 4, 106 S.Ct. at 1565 n. 4; *Accord Bose Corp.*, 466 U.S. at 514 n. 31, 104 S.Ct. at 1967 n. 31 (commenting that there might be many other questions of fact in a defamation case that are irrelevant to the constitutional standard of *New York Times*

Co. v. Sullivan, and to which a "clearly erroneous" standard of appellate review applies).

In *Masson,* the Supreme Court addressed whether a writer's alteration of quotations attributed to the subject of an interview could establish the actual malice required for a defamation suit by a public figure. 501 U.S. at 499, 111 S.Ct. at 2424. The Supreme Court's analysis of actual malice required it to consider the concept of falsity. *Id.* at 513, 111 S.Ct. at 2431. The Court examined six different published passages to determine whether the published passages were materially different from the tape-recorded statements, thereby creating an issue of fact for the jury as to falsity. *Id.* at 522-25, 111 S.Ct. at 2435-37. The Court concluded that one of the passages did not materially alter the meaning of the tape-recorded statement and therefore, was not actionable. *Id.* at 524, 111 S.Ct. at 2436-37. With respect to the other five passages, however, the Court decided that a reasonable jury could find a material difference between the meaning of the published passages and that of the tape-recorded statements. *Id.* at 522-25, 111 S.Ct. at 2435-37. Because a jury could find the differences in the statements exposed the interviewee to contempt, ridicule, or obloquy, the Court held that it could not decide the issue of falsity as a matter of law. *Id. Masson* makes abundantly clear that in reviewing a summary judgment ruling, which involves a similar standard as a review of a directed verdict ruling, we examine the evidence in the light most favorable to the plaintiff and decide if there is sufficient evidence to support a jury finding of falsity. *Id.* at 520-21, 111 S.Ct. at 2434-35.[2]

Recently, we reviewed the district court's grant of summary judgment to a defendant television station on a defamation

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[2] "On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence." *Masson,* 501 U.S. at 520, 111 S.Ct at 2435 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986)). We examine the evidence in a light most favorable to the nonmoving party, to see if there is sufficient evidence to support a jury finding. *Anderson,* 477 U.S. at 255, 106 S.Ct. at 2513-14.

claim. *Toney v. WCCO Television, Midwest Cable & Satellite, Inc.*, 85 F.3d 383 (8th Cir.1996). We reversed the district court's grant of summary judgment as to one of the seven statements alleged to be defamatory. *Id.* at 389. The district court ruled that the statement was not actionable because even if the statement was defamatory, it was true. *Id.* at 386. In an opinion written by Justice White, we agreed with the district court's conclusion that one of the statements "could be defamatory," and, therefore, the issue was one for a jury to decide. *Id.* at 388. We disagreed, however, with the district court's conclusion that the statement was "so plainly true that it could be so characterized as a matter of law." *Id.* We directed that this question should be decided by a jury. *Id.* at 389.

This is not a situation where the underlying facts as to the gist or sting of the defamatory charge are undisputed so that the trial court may determine substantial truth as a matter of law. *Compare Campbell v. Quad City Times, Inc.*, 547 N.W.2d 608, 610 (Iowa. Ct.App.1996), *with Jones,* 440 N.W.2d at 891. As the Third Circuit held *in Schiavone Construction Co. v. Time, Inc.*, "a jury must resolve the question of the sting because reasonable persons could differ on that question." 847 F.2d 1069, 1084 (3d Cir.1988).

There are other issues in defamation actions which courts have reserved for the jury to decide. For example, in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), the Supreme Court rejected the argument that opinions are absolutely protected by the First Amendment, *Id.* at 18-19, 110 S.Ct. at 2705-06, recognizing that "expressions of 'opinion' may often imply an assertion of objective fact," *Id.* at 18, 110 S.Ct. at 2705. The Court allowed the defamation action to go forward, ruling that a reasonable trier of fact could find that the so-called opinion could be interpreted as a false assertion of fact. *Id.* at 21, 110 S.Ct. at 2707. Had the Court believed it must independently decide whether a statement constituted a false statement of fact, the Court would not have used this inquiry. *Accord Partington v. Bugliosi,* 56 F.3d 1147, 1153 (9th Cir.1995) (stan-

dard for summary judgment is whether a reasonable factfinder could conclude that the statements imply a false assertion of objective fact).

Philadelphia Newspapers, Masson, and, in a sense, *Milkovich,* all point to our determination that the First Amendment commands in a defamation case brought by a private plaintiff against a media defendant only that we review the record to determine whether a reasonable trier of fact could find that the statement could be interpreted as a false assertion of fact. In essence, these cases support a sufficiency of the evidence analysis.

We are further supported in this conclusion by *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989), where the Supreme Court, in reviewing an actual malice determination, stated that the clearly erroneous standard could be applied to the credibility determinations, but the reviewing court must determine whether the statements are the character which the First Amendment protects. *Id.* at 686-88, 109 S.Ct. at 2695-96. On review of the record, it agreed with the Court of Appeals that the evidence supported a finding of actual malice. *Id.* at 689, 109 S.Ct. at 2696-97.

Within the context of deciding whether there is substantial evidence to support the jury's finding of falsity, we must also discern whether there has been any intrusion on the protections of the First Amendment. Thus, if no reasonable jury could conclude that the statement was a false statement of material fact, the libel defendant is protected from a defamation suit. *See, e.g., Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222, 1228 (7th Cir.1993) ("The rule making substantial truth a complete defense and the constitutional limitations on defamation suits coincide."); *Campbell,* 547 N.W.2d at 610. The question of whether there has been any intrusion on First Amendment principles is seemingly subsumed in the inquiry as to whether there is substantial evidence to support the jury's findings as to falsity and substantial truth. *See, e.g., Norse v. Henry Holt & Co.,* 991 F.2d 563, 567 (9th Cir.1993) (summary judgment for author appropriate when no reason-

able jury could understand the statement, when read in context, to be defamatory); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 195-96 (8th Cir.1994) (summary judgment for union appropriate when its statements could not reasonably be read to be false assertions of fact).

II.

Regardless of our standard of review, ABC contends that the district court correctly granted judgment to it because Lundell did not prove the falsity of the statement. Alternatively, ABC argues that it is entitled to judgment as a matter of law because Lundell is a public figure for purposes of this action, and did not prove actual malice as defined in *New York Times*.

A.

In this diversity case, we review the district court's interpretation of Iowa law de novo, and give no deference to the district court's interpretation of state law. *Salve Regina College v. Russell*, 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991). Of course, Iowa courts must apply the governing federal constitutional standards in this defamation case. *Toney*, 85 F.3d at 386.

In Iowa, libel "is the malicious publication, expressed either in printing or in writing, or by signs and pictures, tending to injure the reputation of another person or to expose the person to public hatred, contempt, or ridicule or to injure the person in the maintenance of the person's business." *Vinson v. Linn-Mar Community Sch. Dist.*, 360 N.W.2d 108, 115 (Iowa 1984) (internal citation and quotation omitted). Under Iowa law, whether a statement is defamatory "must be determined by giving to the subject-matter thereof, as a whole, that meaning which naturally belongs to the language used." *Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 14 (Iowa 1990). Iowa recognizes substantial truth as an absolute defense in a defama-

tion action. *Palmer Communications*, 440 N.W.2d at 891. "The libel defendant need not establish the literal truth of every detail of the broadcast so long as the 'gist' or 'sting' of the broadcast in question is substantially true." *Id.* The "gist" or "sting" is determined by "looking at the highlight of the broadcast, the pertinent angle of it, and not to the items of secondary importance which are inoffensive details, immaterial to the truth of the defamatory statement." *Id.* (quoting *Behr*, 414 N.W.2d at 342).

ABC argues that the phrase "does not work" used as part of the description of events in Berrien County constitutes the use of language in accord with one of its accepted meanings, and, therefore, the phrase is not materially false. ABC expands on its argument by characterizing the phrase "does not work," as including more than Lundell's interpretation that the machine was mechanically inoperable. ABC explains that a publication is substantially true when the allegedly false statement involves the use of language consistent with an accepted meaning. Because the machine failed to function on a financially self-sufficient basis, failed to solve the county's waste disposal crisis, and had not operated since its permit had been suspended, ABC contends the phrase is substantially true.

In *Bose Corporation,* a manufacturer sued Consumer Reports based on statements disparaging a new type of Bose speakers. 466 U.S. at 487-88, 104 S.Ct. at 1952-54. The Court concluded that the statement was not an assessment of events that speak for themselves, but "one of a number of possible rational interpretations of an event that bristled with ambiguities and descriptive challenges for the writer." *Id.* at 512, 104 S.Ct. at 1966 (internal quotation omitted). The Court did not allow recovery for choice of language which, though perhaps reflecting a misconception, represented 'the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies." *Id.* at 513, 104 S.Ct. at 1966. Similarly, in *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883, 107 S.Ct. 272, 93 L.Ed.2d 249 (1986), we stated that we "will not make editorial judgments about specific word choice in order

to portray a plaintiff in the best possible light, particularly when the 'sting' of the implication . . . is still present when the full chronology is laid out." *Id.* at 1306.

Contrary to ABC's interpretation, the statement did not identify the system as not working, but the machine itself. The statement was specific: "[T]*his garbage recycling machine* . . . does not work." *See Kiner,* 463 N.W.2d at 14. The court used the exact words of the broadcast in submitting the question of falsity to the jury. The jury returned a general verdict in Lundell's favor, requiring it to find that the statement was false. The sting of the broadcast is the heart of the matter in question—the hurtfulness of the utterance. *Jones,* 440 N.W.2d at 891 (quoting *Behr,* 414 N.W.2d at 342). If the underlying facts as to the gist or sting are undisputed, substantial truth may be determined as a matter of law. *Jones,* 440 N.W.2d at 891; *Behr,* 414 N.W.2d at 342. Here, however, it is evident that the underlying facts as to the gist of the statement are the subject of a reasonable dispute, whether the statement goes to the operability of the machine, or its economic shortcoming. When the language used is capable of two meanings, including the one ascribed by a complainant, it is for the jury to decide the meaning conveyed. *Vinson,* 360 N.W.2d at 116. ABC's position that the statement "does not work" meant only that the machine did not operate in a financially viable manner is not expressly included in the story itself. Although Stallings said the machine worked and Chase later discussed the financial aspect of the machine, the story, as a whole, never clarified the original statement that the machine "does not work." The statement is not nearly as ambiguous as the statements in *Bose Corporation* or *Janklow.* The phrase "does not work" is specific and is not the sort of inaccuracy that is "commonplace in the forum of robust debate." *Masson,* 501 U.S. at 514, 111 S.Ct. at 2431 (quoting *Bose Corp.,* 466 U.S. at 513, 104 S.Ct. at 1966). We, therefore, cannot conclude that the story, as a whole, was substantially true as a matter of law.

There is substantial evidence from which a reasonable jury could conclude that the statement was false, and from which

a reasonable jury could conclude that the sting of the story was that the Lundell machine was mechanically inoperable. After carefully examining the videotape, we are satisfied that a reasonable jury could conclude from the plain meaning of the words used, that the statement that the machine "does not work" meant that the machine was inoperable. Even according ABC the independent review it requests, we are confident that there has been no forbidden intrusion on First Amendment principles.

This conclusion is reinforced by other evidence in the record. There is evidence that the very genesis of ABC's report was based on the false premise that the machine was broken. Chase initiated the story after reading an article in the *Atlanta Journal-Constitution* concerning the Berrien County facility and local government revenue bond financing. The article stated that the facility had financial problems, but it did not state that the Lundell machine did not work. Nevertheless, Chase prepared a proposal for a news story about the situation in Berrien County, and her proposal included the statement that the recycling machine "has never worked." Chase acknowledged at trial that she had not interviewed anyone with knowledge of the Berrien County facility before making her story proposal, and that she had no knowledge of who, if anyone, her producer, Elissa Weldon, had interviewed. Chase also admitted that at the time of the broadcast she believed that the machine had a broken main shredder, and this was one reason why she reported that the machine did not work. David Gaskins, the former plant manager for the Berrien County Resource Recovery facility, testified that the entire system, including the main shredder, was operable at the time ABC prepared its report. Others corroborated this testimony.

Before airing the story, Chase contacted Vernon Lundell. Lundell told Chase that the Lundell system in Berrien County worked, that opposition to the system was political, and that he had stayed out of the political dispute in Berrien County. A few days before the broadcast, Gary Lamberson, an independent sales representative for Lundell, contacted Chase and

advised her that any story on the Berrien County facility based on information provided only by local political opponents would not tell the true story of the facility. Lamberson urged Chase to interview the former plant managers to learn the true facts about operation of the system. Lamberson testified that Chase left him with the impression that she was "too busy" to conduct further interviews and that the story was "a done deal."

ABC contacted Gaskins to arrange filming of the recycling system. Gaskins was not interviewed by Chase or Weldon prior to the broadcast. No one from ABC ever asked Gaskins if the Lundell system was capable of processing garbage. When the ABC camera crew came to the recycling plant, one of the crew members remarked to Gaskins that he understood that the plant was broken down. Gaskins responded that all he needed was some garbage to process and "I'll fire it up." After ABC broadcast the story, Lundell contacted ABC seeking a retraction. ABC responded with a letter stating:

> Contrary to your letter, the report does not state that the "system" does not work. What the report does say is that the garbage recycling machine purchased by Berrien County does not work. This is in fact completely true. At the time of our broadcast the Berrien County machine was not functioning. As I am sure you are aware, the main shredder broke down and has not been repaired. Indeed the Georgia Department of Natural Resources has acted to close the facility down.

This evidence amply demonstrates that ABC actually believed that its broadcast stated that the machine was mechanically inoperable, and ABC does not dispute that the machine was mechanically sound. Accordingly, there is substantial evidence from which a reasonable jury could find that the sting of ABC's broadcast was false.

Finally, ABC contends that other parts of the story negate any false implication derived from the statement that the machine was mechanically inoperable: (1) the report included footage showing the machine operating; (2) the report noted

that the machine did turn garbage into fuel pellets and compost and showed fuel pellets made by the machine; (3) the report included the express statement that "there's nothing physically wrong with the machine. It's the people"; and (4) the report showed footage of another Lundell machine operated by Tennessee officials.

These other parts of the story do not change our conclusion.[3] The report did not actually show the machine operating, but only included footage showing a worker sorting garbage and fuel pellets made by the machine. The conclusion drawn from the footage of the Tennessee machine is also inconsistent with ABC's argument. Along with the footage showing the Tennessee machine, Chase states:

> The machine was supposed to work like this one in Tennessee, sorting and recycling up to ninety percent of the county's garbage and paying for itself by selling the recycled materials and charging user fees. That is how then-commissioner Joe Stallings promised it would work here. It did not.

A reasonable jury could easily conclude from Chase's comparison of the Berrien County machine with the Tennessee machine that the Tennessee machine worked, and the Berrien County machine did not. *Cf. Treutler v. Meredith Corp.*, 455 F.2d 255, 258 (8th Cir. 1972). Although Stallings stated that there was nothing physically wrong with the machine, a reasonable juror could discredit the statement, as the story painted Stallings as someone who had misrepresented the machine to the Berrien County taxpayers.

For these reasons, we conclude there is a disputed question of fact as to the sting of the story, and substantial evidence to support the jury's finding of a false statement, making the dis-

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[3] ABC also argues that the district court correctly granted it judgment as a matter of law because Lundell failed to sustain its burden of proving: (1) that the broadcast was "of and concerning" Lundell; and (2) that ABC violated the standard of care practiced by professional journalists. We have carefully considered these arguments and conclude there is substantial evidence to support the jury's findings.

trict court's entry of judgment for ABC erroneous. We reverse the district court's entry of judgment for ABC as a matter of law.

B.

ABC argues in the alternative that the district court's ruling may he upheld because Lundell is a public figure for the purpose of this action, and did not prove actual malice as defined in *New York Times*.

The determination of a plaintiff's status as a private or public figure is an issue of law. *Bagley*, 797 F.2d at 644; *Jones*, 440 N.W.2d at 894 (determination of plaintiff's status is a question of law governed by federal constitutional law).

In *Gertz*, the Court identified two categories of public figures to whom the New *York Times* standard applies:

> The first category is "general purpose" public figures, those who have attained a position "of such persuasive power and influence," and of "such pervasive fame or notoriety," that he or she may be considered "a public figure for all purposes and in all contexts." The second, more common, type of public figure is the "limited purpose" public figure. The court defined this type as a person who voluntarily injects himself or are drawn into a particular public controversy, and thereby becomes a public figure for a limited range of issues.

418 U.S. at 351, 94 S.Ct. at 3013. The Court also noted that "[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." *Id.* at 345, 94 S.Ct. at 3009.

In determining whether an individual should be considered a limited public figure, we must focus our attention on the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Gertz*, 418 U.S. at 352, 94 S.Ct. at 3013. By so doing, we then can determine whether the individual has voluntarily and purposefully

injected himself into that controversy in an attempt to influence the resolution of the controversy. *Id.* at 345, 94 S.Ct. at 3009-10.

Applying these factors, we must first identify the particular public controversy giving rise to the defamatory speech. *Bagley,* 797 F.2d at 645. Here, the particular controversy giving rise to ABC's report was the garbage disposal problem in Berrien County. This controversy is clearly a public controversy involving questions of "public concern." *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 761-62, 105 S.Ct. 2939, 2946-47, 86 L.Ed.2d 593 (1985) (plurality opinion); *Waldbaum v. Fairchild Publications, Inc.,* 627 F.2d 1287, 1296-97 (D.C.Cir.) (defining a public controversy as one raising issues that might reasonably be expected to have an impact beyond the parties directly enmeshed in the particular controversy), *cert. denied,* 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 128 (1980); *Johnson v. Nickerson,* 542 N.W.2d 506, 511 (Iowa 1996) (same).

After identifying the particular controversy giving rise to the defamation, we then examine the "nature and extent" of Lundell's involvement. *Bagley,* 797 F.2d at 645. This inquiry is necessary to determine whether Lundell has "thrust [itself] to the forefront of [this] particular public controvers[y] in order to influence the resolution of the issues involved." *Gertz,* 418 U.S. at 345, 94 S.Ct. at 3009.

The Supreme Court faced a situation very similar to this case in *Hutchinson v. Proxmire,* 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979). Hutchinson did research with primates and received research grants from three federal agencies. *Id.* at 115, 99 S.Ct. at 2678. Senator William Proxmire began a public campaign to expose wasteful government spending by giving a "Golden Fleece" award to federal agencies who funded what Proxmire considered to be wasteful projects. *Id.* at 114, 99 S.Ct. at 2677-78. After denying protection under the Speech and Debate Clause, *id.* at 123-33, 99 S.Ct. at 2682-87, the Court reversed lower court rulings that Hutchinson was a public figure, *id.* at 133-36, 99 S.Ct. at 2687-89. The Court observed that Hutchinson's activities and public

profile were like many members of his profession, and that his public writings reached a relatively small category of professionals concerned with research in human behavior. *Id.* at 135, 99 S.Ct. at 2688. "To the extent the subject of his published writings became a matter of controversy, it was a consequence of the Golden Fleece Award." *Id.* The Court emphasized that, "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.* The Court also reasoned that Hutchinson did not "thrust himself or his views into public controversy to influence others," and at most, the public controversy consisted of concerns about general public expenditures. *Id.* The Court rejected the arguments that Hutchinson's applications for and receipt of federal grants and publications in professional journals elevated him to public figure status. *Id.* The Court's determination was also influenced by the fact that Hutchinson's only access to the media was limited to responding to the announcement of the Golden Fleece award, and that Hutchinson did not have regular and continuing access to the media, one of the accouterments of being a public figure. *Id.* at 136, 99 S.Ct. at 2688-89.

The Supreme Court also reversed lower court rulings that a plaintiff was a limited purpose public figure in *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979). There, publishers of a book described Wolston as being a Soviet agent. *Id.* at 159, 99 S.Ct. at 2703. Sixteen years before the book's publication, Wolston had received newspaper coverage because he had failed to comply with a grand jury subpoena and had been subject to contempt proceedings. *Id.* at 162-63, 99 S.Ct. at 2704-05. Although Wolston's decision not to appear before a grand jury was likely to attract media attention, the Court concluded that this was not the type of activity that established public figure status. *Id.* at 167, 99 S.Ct. at 2707. Wolston did not discuss the matter with the press, and limited his involvement to defending the contempt charges. Furthermore, Wolston did not fail to appear in order to influence the public with respect to any controversy, and did not voluntarily thrust or inject himself

into the controversy concerning Soviet espionage. *Id.* at 168, 99 S.Ct. at 2707-08. The Court said: "It would be more accurate to say that [Wolston] was dragged unwillingly into the controversy." *Id.* at 166, 99 S.Ct. at 2707. "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Id.* at 167, 99 S.Ct. at 2707. "A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*." *Id.* at 167-168, 99 S.Ct. at 2707.

Lundell's status mirrors that of Hutchinson. Lundell did not inject itself into the Berrien County controversy. *See Bagley*, 797 F.2d at 645-46. *Cf. National Found. for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc.*, 705 F.2d 98, 101-02 (4th Cir.), *cert. denied*, 464 U.S. 830, 104 S.Ct. 108, 78 L.Ed.2d 110 (1983). Indeed, Chase admitted that she "did not uncover any evidence from any source that [Lundell] had attempted to inject [itself] into [the] political debate of Berrien County." Although Lundell contracted with the county for the sale of the machine, the Supreme Court makes clear in *Hutchinson* and *Wolston* that it is the plaintiff's role in the controversy, not the controversy itself, that is determinative of public figure status. *See Hutchinson*, 443 U.S. at 135, 99 S.Ct. at 2688; *Wolston*, 443 U.S. at 167, 99 S.Ct. at 2707. Even though the garbage disposal problem was a matter of public concern, we focus on Lundell's role in the controversy, not the public nature of the controversy itself. ABC does not direct us to any evidence that Lundell placed itself into the controversy to influence the issues involved. *See Gertz*, 418 U.S. at 351-52, 94 S.Ct. at 3012-13 (plaintiff not a limited purpose public figure even though he represented a client on a matter related to the controversy at issue). Furthermore, ABC cannot, by its own conduct, create its own defense by making Lundell a public figure. Like the circumstances in *Hutchinson*, there is no evidence that Lundell had access to the media to refute the ABC report. 443 U.S. at 136, 99 S.Ct. at 2688-89. Indeed, ABC denied Lundell's request for a retraction of the story. For these reasons, we reject ABC's alternative argument.

III.

ABC attacks the award of damages on several grounds. First, ABC contends that Lundell cannot recover separate damages for reputational harm and lost profits. Second, ABC contends Lundell failed to prove actual damages and lost profits. The district court instructed the jury to consider three different types of loss: damage to reputation, past lost profits, and future lost profits. The jury awarded no damages for future lost profits, $158,000 for past lost profits, and $900,000 for damage to reputation.

A.

Citing *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F.Supp. 947 (D.D.C. 1976), ABC argues that a corporation cannot recover for both lost profits and injury to reputation.

> The law of libel has long reflected the distinction between corporate and human plaintiffs by limiting corporate recovery to actual damages in the form of lost profits . . . "Although a corporation may maintain an action for libel, *it has no personal reputation* and may be libeled only by imputation about its financial soundness or business ethics."

Id. at 955 (quoting *Golden Palace, Inc. v. National Broadcasting Co.*, 386 F.Supp. 107 (D.D.C.1974)).

ABC sets forth a policy argument that we should adopt the reasoning of the district courts of the District of Columbia. The Iowa courts, however, appear to uniformly allow business entities to recover damages for injury to their reputation as well as lost profits. *See, e.g., Vojak v. Jensen,* 161 N.W.2d 100, 106, 110-11 (Iowa 1968); G & H *Soybean Oil, Inc. v. Diamond Crystal Specialty Foods, Inc.*, 796 F.Supp. 1214, 1217 (S.D.Iowa 1992) (applying Iowa law). We therefore reject ABC's argument.

We also reject ABC's argument that there is insufficient proof of actual damages. Vernon Lundell testified that Lundell began operating in 1945 and had always had an excellent reputation in the industry and in Iowa. Another witness testified that just before the broadcast, Lundell was the industry leader for this type of equipment. Several witnesses testified that after the broadcast, interest in the machine vanished. It is undisputed that Lundell never sold another machine following the broadcast. This evidence is more than sufficient to sustain the jury's finding that Lundell was damaged by the story. There is also competent evidence to support the jury's monetary award. *See Gertz,* 418 U.S. at 350, 94 S.Ct. at 3012. The historical sales data, as well as evidence that Lundell spent $2 million dollars in the development of the recycling system, constitutes competent evidence of the dollar value of the injury.[4] *See id.*

B.

ABC contends that even if we reverse the district court's entry of judgment, we must affirm the court's alternative ruling that Lundell failed to prove lost profits resulting from the broadcast. ABC contends that in order to recover lost profits, Lundell must identify the sales it lost because of the report.

Lundell contends that the district court can only reverse the jury verdict if the verdict is against the great weight of the evidence. *See White,* 961 F.2d at 780. Lundell confuses the standard for reviewing a ruling on a motion for a new trial on the ground that the verdict is against the weight of the evidence with the standard for reviewing a ruling on a motion for judgment as a matter of law. *Id.* at 779-80. Here, the district court entered judgment as a matter of law because there was a lack of evidence of lost profits. Accordingly, our standard of review is whether there is sufficient evidence to support the verdict, not whether the verdict is against the great weight of the evidence. *See id.*

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[4] For those reasons, we also reject ABC's contenion that the award is excessive.

The level of proof required to establish the exact amount of lost profits is not as high as the level of proof required to establish that some loss occurred. *Orkin Exterminating Co. v. Burnett*, 160 N.W.2d 427, 430 (Iowa 1968). As the Iowa Supreme Court explained:

> Courts have recognized a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages. If it is speculative and uncertain whether damages have been sustained, recovery is denied. If the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated.

Id.

The Iowa Supreme Court has rejected the argument that a plaintiff must identify specific lost sales to recover lost profits damages. *Page County Appliance Ctr., Inc. v. Honeywell, Inc.*, 347 N.W.2d 171, 178 (Iowa 1984). Decreased income after the defendant's damaging conduct is sufficient to support an award for lost profits so long as the record discloses a reasonable basis from which the amount can be inferred or approximated. *Id.* "Simply because the loss of profits cannot be shown with precision, defendant who caused the damages, may not be heard to say that no damages may be awarded." *Orkin*, 160 N.W.2d at 430 (quoting *Exercycle of Mich. Inc. v. Wayson*, 341 F.2d 335, 337 (7th Cir. 1965)).

The district court set aside the lost profits award for two reasons. First, it concluded that there were "tremendous problems" with the machines sold by Lundell, and that Lundell had to take back most machines it sold through litigation or otherwise. Second, the court concluded that Lundell's evidence concerning lost sales was inconsistent. Vernon Lundell testified that Lundell would have sold over twenty systems in the two years following the story. Vernon Lundell's son-in-law and vice-president of the company, Steve Paulsen, testified that he thought the company could have only sold four systems.

Although Lundell's and Paulsen's testimony is inconsistent, it does not cause us to conclude that there was no reasonable basis for calculating lost profit damages. The jury was free to accept or reject the opinion of either one of these witnesses. The discrepancy between the two witnesses does not make the damage amounts lacking in a reasonable basis, but only demonstrates the opinions of different witnesses. Further, there was other evidence to support the lost profits award. First, there was evidence that before the report there was substantial interest in the Lundell machine, and following the report, Lundell could not sell a single machine. There was evidence that in the years before the report, Lundell sold an average of two recycling systems per year, and that each machine had a gross profit of approximately $240,000. The historical sales figures for the years preceding the story also provide a reasonable basis for approximating lost profits damages. Indeed, Lundell earned $158,000 in 1987 on sales of over $1.5 million, representing the sale of one machine.

Furthermore, the issue of whether the machines had "tremendous problems" was conflicting. Lundell presented extensive evidence that the defamatory statements in the ABC report killed interest and sales of the Lundell machine. ABC refuted this theory, presenting evidence that the loss of sales was caused by intrinsic problems with the machine. There was evidence supporting both theories, and it was an issue for the jury, not the court, to resolve.

Thus, we conclude that a reasonable basis existed to support an award of lost profits. We reverse the district court's alternative ruling setting aside the lost profits award.

We reverse the district court's entry of judgment for ABC. We remand to the district court with directions that the court reinstate the jury verdict for Lundell and award of damages for Lundell, including damages for lost profits.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C92-4060
Filed: September 28, 1995

LUNDELL MANUFACTURING COMPANY, INC.,

Plaintiff,

—VS.—

AMERICAN BROADCASTING COMPANIES, INC.,

Defendant.

ORDER

This matter comes before the court pursuant to plaintiff's Motion to Alter or Amend Judgment, Docket #104; defendant's Motion for Judgment as a Matter of Law or for a New Trial, Docket #106; and defendant's Motion to Exceed Page Limitation, Docket #109. The court held oral argument on these motions. Defendant's Motion for Judgment as a Matter of Law is granted. Defendant's Motion for a New Trial is denied as moot. Plaintiff's Motion to Alter or Amend Judgment is denied as moot. Defendant's Motion to Exceed Page Limitation is granted.

This is an action for libel arising out of the July 2, 1992 broadcast of "World News Tonight with Peter Jennings" in which ABC broadcast a story by employee Rebecca Chase concerning a solid waste recycling system in Berrien County, Georgia. The recycling system was manufactured by the

plaintiff Lundell Manufacturing Company. Lundell claimed that the news report was libelous as to it in three respects. First, the broadcast stated that taxpayers in Berrien County, Georgia "are angry that they are stuck with a $3 million debt for this garbage recycling machine that they never approved and does not work." The second statement was that "the machine turned the garbage into fuel pellets and compost, but no one found a buyer." Finally, the report stated, "Taxpayers are now forced to have their trash hauled to another county's landfill fifty miles away and pay yet again to get rid of their garbage."

In an order filed April 13, 1994, the court dismissed the third specification of libel pursuant to the defendant's Motion for Summary Judgment. The case proceeded to trial and, at the close of the plaintiff's case, the court directed a verdict in favor of the defendant with respect to the second statement. Accordingly, the case went to the jury on the sole claim arising out of the statement that the garbage recycling machine "did not work." The jury returned a verdict in favor of the plaintiff in the amount of $1,058,000 which consists of lost profit damages in the amount $158,000 and $900,000 damage to the company's reputation.

MOTION FOR JUDGMENT AS A MATTER OF LAW

Pursuant to Federal Rule of Civil Procedure 50(b):

Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial. Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than ten days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the

> alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

A motion for judgment as a matter of law presents a legal question to the district court as to whether there is sufficient evidence to support a jury verdict. The evidence is viewed in a light most favorable to the prevailing party and the court must not engage in a weighing or evaluation of the evidence or consider questions of credibility. *Smith v. World Insurance Company*, 38 F.3d 1456, 1460 (8th Cir. 1994). This is the same rigorous standard that the court employed when considering motions for judgment notwithstanding the verdict. *Larson By Larson v. Miller*, 55 F.3d 1343, 1348, n.3 (8th Cir. 1995).

The court must (a) consider the evidence in the light most favorable to the prevailing party; (b) assume that the jury resolved all conflicts of evidence in favor of that party; (c) assume as true all facts which that party's evidence tended to prove; (d) give that party the benefit of all favorable inferences which may reasonably be drawn from the proved facts; and (e) deny the motion if in light of the above reasonable jurors could differ as to the conclusions that could be drawn from the evidence. *Farley v. Henson*, 11 F.3d 827, 831 (8th Cir. 1993).

The Eighth Circuit Court of Appeals has recently noted that there is an issue as to whether state or federal law should be applied to motions for judgment notwithstanding the verdict in a diversity case. However, because the standards under federal and Iowa law are the same, the question has no significance in this case. *Chadima v. National Fidelity Life Insurance Company*, 55 F.3d 345, 347, n.5 (8th Cir. 1995).

In its Renewed Motion for Judgment as a Matter of Law, the defendant argues that the plaintiff failed to sustain its bur-

den of proving that the broadcast was "of and concerning" the plaintiff. This question was addressed early in the life of this case and was rejected in the context of a Motion for Judgment on the Pleadings. *See* Order, dated July 23, 1993, Docket #31.

At trial, the court leaned a great deal of information about the context in which ABC aired this story. It was done as a part of a series on taxpayer anger or activism in America. The court believed before trial and still believes that a reasonable juror could find that the focal point of anger in this case was on the purchase of a machine that did not work. Although Lundell is not named in the story, the Lundell logo can briefly be seen. Most importantly, the identity of the manufacturer of this machine that "did not work" would not be a secret to those in the industry or those contemplating the purchase of such a machine. Accordingly, the court found that the question as to whether the story was of and concerning the plaintiff should be submitted to the jury. The court believes that it accurately instructed the jury on this subject as the first element that the plaintiff was required to prove. *See* Instruction No. 3. The court is convinced that a jury issue was presented and that the jury was properly instructed on this element of the plaintiff's burden of proof.

The defendant also continues to argue that the plaintiff was a limited purpose public figure such that it would have to prove actual malice before it could recover damages. The court directed a verdict in favor of the defendant on the issue of actual malice. (Tr. 776).[1] No party has yet alleged error in this regard. Further, after a discussion of all the relevant factors with counsel, the court found that Lundell is a private-figure plaintiff. (Tr. 776-777). Again, the court is convinced that Lundell is a private-figure plaintiff as it has never thrust itself into public controversy and has simply sold machines to industries or endeavors that are significantly regulated. Lundell never attempted to influence the outcome of the public controversy in Berrien County, Georgia. When controversy arose, Lundell refused to get involved. An excellent discus-

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[1] Transcript of trial, Volume 5.

sion of these same issues in an analogous context is found in *Jones v. Palmer Communications Incorporated*, 440 NW 2d 884 (Iowa 1989).

The defendant next argues that the plaintiff failed to produce expert testimony concerning the standard of care employed by journalists to assist the jury in determining whether the defendant was negligent in airing the story. The court again looked to *Jones v. Palmer Communications, supra*, in which the Supreme Court of Iowa held that custom in the trade is relevant but not controlling. The Supreme Court also looked to the factors set forth in Restatement (2d) of Torts, Section 580B. These factors were accurately set forth in Instruction No. 3 to the jury.

The court recognizes that there is a split of authority on the issue of whether expert testimony has to be produced on the standard of care for journalists in libel cases. *See generally Annotation, Libel and Slander: Necessity of Expert Testimony to Establish Negligence of Media Defendant in Defamation Action by Private Individual*, 37 ALR 4th 987 (1985). However, in this case the court concludes that expert testimony was not required to assist the jury in determining whether the defendant was negligent in stating that the machine "did not work" as opposed to stating that the machine did not work in the intended or financially viable manner. The court concludes that this is a matter within the common understanding of lay persons.[2]

The most difficult question presented in the Renewed Motion for Judgment as a Matter of Law concerns the defense of substantial truth. Again, the court is convinced that the jury was accurately instructed on this defense. *See* Instruction No. 5. However, the court concludes that although the question is close, this is a case in which it can be determined as a matter of law that the report was substantially true.

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[2] The defendant produced the conclusory opinions of Elissa Weldon to the effect that the standards of journalistic competence were met in this case. However, there was nothing about Ms. Weldon's testimony in this regard that was helpful in determining what the standards were or why her expertise assisted the jury in making that determination.

This subject was addressed at length in this court's order of April 13, 1994, beginning at page 9. A brief recap of the news story and the evidence is important. The story announced at the outset that the garbage recycling machine did not work. At that point in the story, the term "work" was not defined and, without more, one might be left with the conclusion that the machine did not physically operate. Later in the story, Rebecca Chase explains that the Berrien County machine was supposed to work like a Lundell machine that was shown in operation in Tennessee, sorting the trash and paying for itself by selling the recycled materials and charging user fees. It is followed by a clip from Berrien County Commissioner Joe Stallings in which he states, "There's nothing physically wrong with the machine. It's the people."

In this court's order of April 13, 1994, the court found it was "at least arguabl[e]" that the report stated that the machine itself did not work. *Id.*, at 13. The court further stated that Mr. Stallings' statement could at least arguably be interpreted by a jury as an excuse or an attempt to shift the blame for purchasing a machine that did not function properly. *Id.* The court also noted that it is not until almost one-third of the way through the report that there is an implication that the machine functioned adequately, but did not work in the sense of being financially viable.

The court now concludes that its concern about the delay in defining what is meant by the phrase "did not work" is not a sufficient concern to take this matter out of the doctrine of substantial truth. When a trial court can find as a matter of law that a challenged publication is substantially true, it may properly grant judgment for the defendant. *Moldea v. New York Times Company*, 15 F.3d 1137, 1150 (D.C. Cir. 1994), modified on other grounds, 22 F.3d 310 (D.C. Cir. 1994).

Generally, the law in this area was accurately set forth in this court's order of April 13, 1994 and need not be set forth here again. However, it bears repeating that:

> The rule of substantial truth is based on a recognition that falsehoods which do no *incremental* damage to the

> plaintiff's reputation do not injure the only interest that the law of defamation protects. A news report that contains a false statement is actionable "only when 'significantly greater opprobrium' results from the report containing the falsehood than would result from the report without the falsehood." *Herron v. King Broadcasting Co., supra*, 776 P.2d at 102. Even when the plaintiff in a defamation suit is not a public figure, the Supreme Court insists in the name of the First Amendment that unless the author is deliberately lying or is recklessly indifferent to the truth or falsity of what he says (neither is a plausible hypothesis here), the plaintiff must prove actual though not necessarily pecuniary harm in order to recover damages. *Gertz v. Robert Welch, Inc.*, 418 US 323, 349-50, 94 S.Ct. 2997, 3011-12, 41 L.Ed. 2d 789 (1974). Falsehoods that do not harm the plaintiff's reputation more than a full recital of the true facts about him would do are thus not actionable. The rule making substantial truth a complete defense and the constitutional limitations on defamation suits coincide.

Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222 (7th Cir. 1993) at 1228. *See also Jones v. Palmer Communications*, 440 NW 2d 884 (Iowa 1989).

The importance of placing the allegedly defamatory statements in the context of the work as a whole has been stressed on occasions too numerous to cite. *See generally Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993) ("A magnifying glass is no aid to appreciating a Seurat, and the pattern of a complex structure is often discernible only at some distance.") *Id.*, at 1098.

After elucidation of the context throughout the jury trial, this court now concludes that *Norse v. Henry Holt and Company*, 991 F.2d 563 (9th Cir. 1993) is helpful authority on the issue of substantial truth. In that case the plaintiff contended that the following sentence contained about him in a book was libelous: "Harold thought of himself as 'dark-horse Norse,' ignored and unpublished." The Ninth Circuit Court of

Appeals held that, in context, the word "unpublished" does not mean literally that Norse had not been published. Rather, it reflected Norse's own perception of himself as an artist who was unfairly neglected and ignored. In a footnote, the Court set forth its impression of the work as a whole indicating that it was generally complimentary of poet Harold Norse.

In context, the ABC story stated that Lundell's machine in Berrien County, Georgia was supposed to work like the Lundell machine in Tennessee which paid for itself by selling recycled fuel pellets and charging user fees. The story noted that Lundell made recyclable fuel pellets but cast blame by implication on local authorities for their failure to find a buyer for the pellets.[3] The court distinguished *Norse* in its April 13, 1994 order. Frankly, that distinction now escapes the court and the court concludes that this authority solidly favors the defendant.[4]

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[3] Ironically, the statement about a failure to find a buyer for the pellets was inaccurate as a local Archer-Daniels-Midland plant had purchased pellets and there was evidence that a member of the ABC crew knew this. The court granted judgment as a matter of law to the defendant on this point at the close of the plaintiff's case because the statement was not "of and concerning" the plaintiff. However, in the context of the statement about the machine not working, this inaccuracy favors the plaintiff in that it shows that the machine made the pellets, but there simply was not a market for them in Georgia.

[4] The court's conclusions concerning the doctrine of substantial truth render moot plaintiff's motion for prejudgment interest and the defendant's other arguments concerning the plaintiff's proof of damages. For the sake of completeness, the court notes that it would have struck plaintiff's damages in the amount of $158,000 for lost profits in any event. The defendant contends that these damages were too speculative to be submissible. The plaintiff contends that it produced a reasonable basis from which uncertain damages could be approximated.

Iowa law is clear that there is a distinction between proof of the fact that damages have been sustained and proof of the amount of damages. If it is speculative and uncertain whether damages have been sustained, recovery is denied. If the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated. *Kanzmeier v. McCoppin*,

Pursuant to FRCP 50(c), if the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence—it can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict. *White v. Pence*, 961 F.2d 776, 780 (8th Cir. 1992).

The defendant requests a new trial contending that the evidence is insufficient to support the jury's finding in favor of the plaintiff. This is really an argument in favor of judgment as a matter of law, rather than a request for a new trial. Similarly, other reasons urged in support of ABC's request for a new trial such as error in instructing on damage to reputation,

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398 NW 2d 826, 833 (Iowa 1987). *See also Hayes v. Hettinga*, 228 NW 2d 181, 186 (Iowa, 1975). Under Iowa Law, the jury need not make the computation of damages with mathematical exactness. It is enough if there is proof of a rational basis for computation. *Lakota Girl Scout Council v. Harvey Fundraising Management, Inc.*, 519 F.2d 634 (8th Cir. 1975); *Hoover v. Valley West Des Moines*, 823 F.2d 227 (8th Cir. 1987).

The court is convinced that this story did damage to Lundell Manufacturing. There was tremendous interest in the plaintiff's recycling products up until the time that the story aired. Lundell was selling a relatively small number of these machines, but it was relatively consistent for several years before the July 2, 1992 story. The problem as far as the plaintiff's proof at trial was two-fold. First, the machines that Lundell sold had tremendous problems and the defendant did a very credible job of showing that most of these machines that were sold had to be taken back by Lundell through litigation or otherwise. Second, plaintiff's own evidence concerning lost sales was very inconsistent. On one day at trial, Vernon Lundell testified that but for the ABC story the plaintiff would have sold over twenty garbage recycling systems in the two years following the story. (Tr. 81). The next day, Vernon Lundell's son-in-law and vice-president of the plaintiff testified that the company would have sold three to four systems in the two years following the story. (Tr. 522). Because of these problems, the court is left with the conclusion that there has not been proof of a reasonable basis from which the amount of Lundell's lost profits could be inferred or approximated.

on the burden of proof, in the admission of evidence, and the form of the verdict, are not appeals to the discretion of the court to prevent a miscarriage of justice but are rather invitations to change legal rulings in the context of another trial. Except to the extent noted above, these requests are denied.

The only request for a new trial that asks the court to reweigh the evidence is the defendant's argument that the verdict of the jury was so excessive as to shock the conscience. The request for a new trial on this ground is denied. A verdict in the amount of $900,000 for damage to reputation is not excessive when one considers the size and age of this company and the evidence concerning the impact that ABC's story had on plaintiff's business. A verdict in the amount of $900,000 does not seem excessive when one considers the investment alone that Lundell made in retooling its plant to manufacture these garbage recycling machines. The plaintiff presented evidence from which the jury could reasonably find that the plaintiff's reputation in the industry was damaged to the extent that the investment that plaintiff had made is now worthless. Under these circumstances, the request for new trial is denied.

Upon the foregoing

IT IS ORDERED that

1. Plaintiff's Motion to Alter or Amend the Judgment, Docket #104, is denied as moot.

2. Defendant's Motion for Judgment as a Matter of Law, Docket #106, is granted. Its Motion for a New Trial is denied as moot.

3. Defendant's Motion to Exceed Page Limitation, Docket #109, is granted.

September 28, 1995.

/s/ JOHN A. JARVEY
John A. Jarvey
Chief Magistrate Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C92-4060
Filed: September 28, 1995

LUNDELL MANUFACTURING COMPANY, INC.,

—v.—

CAPITAL CITIES/ABC, INC.
and AMERICAN BROADCASTING COMPANIES, INC.,

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☑ Decision by Court. This action came to trKaKK ðt hearing before the Court. The issues have been trKeKdK ðr heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT plaintiff, Lundell Manufacturing Company, Inc., take nothing from defendants, Capital Cities/ABC, Inc. and American Broadcasting Companies, Inc.

September 28, 1995
Date

/s/ WILLIAM J KANAK
Clerk
/s/ ILLEGIBLE
(By) Deputy Clerk

EXCERPTS FROM BENCH DECISION ON MOTION FOR A DIRECTED VERDICT

[770] THE COURT: Thanks. Your clients weren't told to be here, but are they going to be here before 9 or just 9 o'clock?

MR. LUNDBERG: I don't know, Your Honor.

THE COURT: I'm about to take away part of their case; and so I don't like to do that when they're not here, but I didn't ask them to be here.

MR. LUNDBERG: Let me see if they're here.

I don't see them, Your Honor. As far as I'm concerned we can go ahead.

THE COURT: Yeah, that's fine. I mean, I want people to understand that when they [771] lose certain things that it was the product of deliberation and that the matters were fully and freely discussed and that the law was considered and that sort of thing.

The motion for a directed verdict is granted with respect to the "no one found a buyer" statement. It's also granted with respect to actual malice on the it "did not work" statement. It's denied or ruling is reserved in all over respects.

With respect to the statement that the machine turned garbage into compost and pellets but no one found a buyer, in order for that statement to be of and concerning the plaintiff there has to be some implication that it's the fault of the machine or Lundell Manufacturing.

When it is said that no one found a buyer it has to mean that there was no market for this stuff, the pellets, or that there is—there is a market but that the Berrien County officials didn't know or were unable or couldn't, didn't how to sell it.

The question is whether that statement implies that there was—that it's the machine itself or that the pellets were of poor [772] quality; but from the words that were used in the broadcast and the reasonable inferences therefrom, the fact

that they can't sell them or that no one found a buyer is not a criticism of the quality of the pellets and the machine.

The story did not really, I don't think, come close to criticizing the quality of the pellets. What it was at that point was critical of Joe Stallings for his—perhaps his failure to investigate a market or whatever, but it's—it was the concern about his promises that he made in terms of the—what the machine would do.

Of course, this is not a question of involving what the Court believes but rather a question of what a reasonable juror could find from the evidence that has been presented, taking that evidence in a light most favorable to the plaintiff.

And as we know from all of our research, I think we all agree that for something to be of and concerning the plaintiff there must be an inference—by inference or otherwise it must refer to the plaintiff in some intelligent way.

[773] That, of course, is not a standard that's easily or mathematically applied. But here it must—it must refer to them in some way as to suggest that there was a—an obligation, a duty or some other form of responsibility on the part of Lundell Manufacturing for the failure to find a buyer for these pellets.

There is, of course, no direct reference; but that's not necessary. Under the law, you know, an inference is permissible. Of course, the direct reference here is to—I'm not sure if it's Joe Stallings or the county commissioners. It seems to me like Joe Stallings is the primary one who's taking the brunt of the blow here; but whether it's him or the commissioners, it doesn't matter.

It's just simply without more I don't believe that a jury could find that this particular statement about the failure to find a buyer is a statement of and concerning Lundell. For that reason, the motion for a directed verdict is granted with respect to that particular claim.

Going on to the question of actual [774] malice, we know from *Anderson v. Liberty Lobby* that where there's a factual dispute concerning actual malice, the appropriate directed

verdict standard will be whether there is evidence in the record that could support a reasonable jury's finding of actual malice by clear and convincing evidence or with convincing clarity. Courts must take into consideration the burden of proof there, and the difference in that burden of proof from the ordinary preponderance standard in determining whether a reasonable jury could so find.

Actual malice as applied to a media defendant does not refer to its ill will. The primary focus has to be on the defendant's attitude toward the truth of the statements rather than the defendant's attitude towards the plaintiff.

And as we know from *New York Times v. Sullivan* that a statement that is made with actual malice—or a statement is made with actual malice if it is made with knowledge that it is false or with reckless disregard of whether it is false or not.

A failure to exercise ordinary or [775] reasonable care in ascertaining the truth of the published material does not standing alone render a publisher liable for punitive damages with the actual malice standard for defamation of a private figure.

In order to establish recklessness the plaintiff must prove that the defendant had a high degree of awareness of the probable falsity of the statements published. The standard is based on the defendant's actual state of mind, and the recklessness of the conduct is not measured by whether a reasonably prudent person would have published the material or would have investigated before publishing it.

We do know that the failure to investigate will sustain a claim of actual malice where there is information in the publisher's hands that obviously contradicts the information that they have.

In this case the—with respect to the statement it "does not work," the showing of the machine in operation, the interview on the broadcast with Joe Stallings, the demonstration of the machine in Tennessee, and other facts in the record show that there could not have been a [776] high degree of awareness of the probable falsity of statements published concerning

whether the machine worked. And for that reason, the motion for a directed verdict is also granted with the—with respect to the claim of actual malice.

The defendant thinks that the directed verdict on the actual malice standard means that the case is over, but the Court disagrees. Lundell is a private-figure plaintiff, and I've not seen anything to change my opinion on that in the evidence here this week.

Lundell has not thrust itself into public controversy. In fact, the evidence is that they—what evidence there is on that subject is that it attempted to avoid that, the public controversy that arose in Berrien, Georgia.

The mere fact that Lundell Manufacturing sold to a government entity is not sufficient evidence to establish that it is a public figure. It is true that Lundell sells to entities in a highly regulated industry; but it itself, Lundell, has not been shown to be the subject of regulations other than, you know, [777] what one would assure all manufacturers are—how they're regulated.

The regulations that we were talking about have to do not with the manufacture or the selling of these machines but rather in the manner in which the material that's sent through their machine is handled. And that does not place Lundell Manufacturing in such a position of a regulated industry such that the—it makes them a public—or a public-figure defendant—plaintiff, I'm sorry.

There are cases that ABC had cited that says the corporation never has a private life. It think those are the minority of authority, and I think the case law to the contrary, specifically there are cases cited in the plaintiff's brief from the First Circuit and perhaps other places, that demonstrate that a corporation is entitled under appropriate circumstances to be treated as a private plaintiff.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 92-4060
Filed: April 13, 1994

LUNDELL MANUFACTURING COMPANY, INC.,

Plaintiff,

—VS.—

CAPITAL CITIES/ABC, INC.,

Defendant.

ORDER

This matter comes before the court pursuant to defendants' February 7, 1994, motion for summary judgment (docket number 41). Plaintiff resisted the motion on March 8, 1994. The motion is granted in part and denied in part.

UNDISPUTED FACTS

On July 2, 1992, the defendants, Capital Cities/ABC, Inc., and American Broadcasting Companies, Inc. (collectively "ABC"), as part of the ABC nightly news program, "World News Tonight with Peter Jennings," broadcast a story by employee Rebecca Chase concerning a solid waste recycling system in Berrien County, Georgia (the County), manufactured by plaintiff Lundell Manufacturing Co., Inc. (Lundell). Lundell alleges that three statements made in that report are false and libelous.

In March of 1987, Berrien County Commissioner Joe Stallings (Stallings) travelled to Lundell's plant in Cherokee, Iowa, as part of his investigation of ways to resolve the County's solid waste disposal problems. Following Stallings's report to the County Commission, the Commission voted to purchase a garbage recycling machine from Lundell (the Lundell machine) for which they were eventually billed $1,012,877.74. The Lundell machine sends garbage through a series of sorting stations on conveyer belts. Recyclable materials are removed, then the remaining trash is made into compost or into fuel pellets of compressed trash.

The County set up a separate entity, the Berrien County Resource Recovery Development Authority (the Authority), and entered into an intergovernmental contract with it under which the Authority was to operate the Lundell machine and to provide garbage and waste disposal services for the County. The Authority financed purchase of the Lundell machine and set-up costs for the waste disposal project by issuing $2 million in revenue bonds. The issuance of these bonds did not require voter approval.

The Authority was intended to be financially self-sufficient. Revenue for operations and to retire the bonds was to come from "tipping fees" and sale of recyclable materials produced by the Lundell machine, including the compost and fuel pellets. However, the County agreed to pay any deficit between revenues generated by the Authority and the amount required for its operations and to pay the principal and interest on the revenue bonds. While the Authority was operating the Lundell machine, the County was required to supplement the revenues collected by the Authority.

In 1990, the Authority attempted to increase the tipping fees to help finance its operations. That attempt resulted in litigation between the Authority and municipalities in the County. Residents of the County filed a class action suit in October of 1991 for declaratory judgment and injunctive relief to prevent the County from making further supplemental payments to the Authority and to invalidate the County's obligation to cover the bonds.

The Authority was not able to sell all of the recyclable items produced by the Lundell machine. Compost and fuel pellets were stored outside on the property where the Lundell machine was housed. In May of 1992, the Georgia Department of Natural Resources revoked the permit authorizing the Authority to operate the Lundell machine. The County now has garbage hauled to a landfill in another county.

The problems and litigation involving the County's waste disposal project led first to a report in the Atlanta *Journal-Constitution* on June 21, 1992, then to the ABC World News Tonight report in question here on July 2, 1992. ABC News personnel conducted an investigation prior to airing the July 2, 1992, report. They reviewed documents from the litigation involving the Authority, county commission documents, audit information, and documents from the Georgia Department of Natural Resources. They also interviewed present and former County officials, County residents, Lundell personnel, including company president, Vernon Lundell, but did not interview the Authority's plant manager, David Gaskins.

Lundell filed a libel complaint against ABC on August 10, 1992, and an amended complaint on August 11, 1992. The complaint and amended complaint allege that three statements in the broadcast of July 2, 1992, were false and libelous. The first statement is that taxpayers in Berrien County, Georgia, "are angry that they are stuck with a 3 million dollar debt for this garbage recycling machine that they never approved and does not work." The second statement is, "The machine turned the garbage into fuel pellets and compost, but no one found a buyer." The third statement is, "The final insult: taxpayers are now forced to have their trash hauled to another county's landfill 50 miles away and pay yet again to get rid of their garbage."[1] Although Lundell is never named, its logo appears in pictures of the recycling machine.

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[1] The full text of the broadcast is provided in Exhibit 2 of ABC's motion for judgment on the pleadings (docket no. 22). A videotape of the full broadcast is provided in Exhibit 1 of the same motion.

ABC answered Lundell's complaint on October 9, 1992. ABC has now moved for summary judgment on the ground that as a matter of law Lundell cannot prove either liability or damages as the result of its July 2, 1992, report. Specifically, ABC argues that Lundell cannot demonstrate that the challenged statements were false. ABC next argues that the statements are not actionable because they were substantially true. ABC also argues that Lundell cannot demonstrate that ABC was negligent, such that ABC could be liable for actual damages, and further, that Lundell cannot demonstrate the requisite evidence of actual damages. Finally, ABC argues that Lundell cannot show ABC acted with "actual malice," such that ABC can be held liable for presumed or punitive damages.

CONCLUSIONS OF LAW

A. Standards For Summary Judgment

On a motion for summary judgment, the court considers the entire record. Federal Rule of Civil Procedure 56 governing summary judgment states, in pertinent part:

> Rule 56. Summary Judgment
>
> (b) For Defending Party. A party against whom a claim . . . is asserted . . . may, at any time, move for summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereon. . . . *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*

Fed. R. Civ. P. 56(b) & (c) (emphasis added); *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Burk v. Beene*, 948 F.2d 489, 492 (8th Cir. 1991); *Moore v. Webster*, 932 F.2d 1229, 1231-32 (8th Cir. 1991).

"Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears the burden of showing that no genuine issue of fact exists. *Reed v. Woodruff County, Ark.*, 7 F.3d 808, 810 (8th Cir. 1993). Once the movant has met that burden, the non-moving party must designate specific facts showing that a genuine dispute about a material fact remains for trial. *Id.* Although "direct proof is not required to create a jury question, . . . to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.' " *Metge v. Baehler*, 762 F.2d 621, 625 (8th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986).

Libel in Iowa is the "malicious publication, expressed either in printing or in writing, or by signs and pictures, tending to injure the reputation of another person or to expose [the person] to public hatred, contempt, or ridicule or to injure [the person] in the maintenance of [the person's] business." *Vinson v. Linn-Mar Community School Dist.*, 360 N.W.2d 108, 115 (Iowa 1984). It is not necessary that the allegedly defamatory publication identify the plaintiff by name, only that it "by inference or innuendo at least refer in an intelligent way to the person libeled." *Boardman & Cartwright v. Gazette Co.*, 281 N.W. 118, 120 (Iowa 1938); *See also Brown v. First Nat'l Bank of Mason City*, 193 N.W.2d 547, 553 (Iowa 1972) (plaintiff not named in news item, but identity clear from circumstances). Whether a publication is understood as defamatory "must be determined by giving to the subject-matter thereof, as a whole, that meaning which naturally belongs to the language used." *Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 14 (Iowa 1990). In *Jones v. Palmer Communications, Inc.*, 440 N.W.2d 884, 891 (Iowa 1989), the Iowa Supreme Court stated that

> [i]n considering the content of any television broadcast, it is important to see the actual broadcast. A written summary is insufficient to provide the full impact of the telecast.

It is for the court to determine whether the words are capable of a defamatory meaning, and for the jury to determine whether they were so understood. *Kiner*, at 14; *Brown*, at 553.

The United States Supreme Court has made it clear that a libel plaintiff must bear the burden of proving that the challenged statements were false. *In re IBP Confidential Bus. Documents Litigation: Bagley v. Iowa Beef Processors, Inc.*, 797 F.2d 632, 647 (8th Cir. 1986) (hereinafter *Bagley*) (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986)). In order to recover actual damages, the libel plaintiff who is a private figure[2] must establish the "fault" of the defendant in publishing those false statements. *Id.*; *see also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Finally, in order to recover presumed or punitive damages, the libel plaintiff who is a private figure must in addition to proving falsity prove by clear and convincing evidence that the defendant's actions in publishing the challenged statements constituted "actual malice" as defined in *New York Times v. Sullivan*, 376 U.S. 254 (1964). *Id.* If the libel plaintiff is a public figure, and the allegedly libelous statements involve a matter of public concern, the plaintiff must prove "actual malice" on the part of the defendant to establish liability and to recover any damages. *Gertz*, *supra*, at 335-36; *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162 (1967); *New York Times*, *supra*, at 279-80. It follows from the cases cited above

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[2] The parties dispute whether Lundell is a private or public figure and whether the issue involved in the July 2, 1992, report was a matter of private or public concern. Neither party has moved for summary judgment on these issues and it is not necessary for the court to decide them here. In the context of the present motion, the court need only determine whether Lundell can meet any standard of proof necessary for liability and damages.

that ABC will be entitled to summary judgment only if it can establish that there is no genuine issue of material fact as to falsity, substantial truth, fault, actual damages, or actual malice and that ABC is entitled to judgment as a matter of law on each of these issues.

B. Falsity And Substantial Truth

Lundell must first establish that the challenged statements in the July 2, 1992, report are false. *Bagley*, *supra*, at 647. True statements, no matter how damaging to the plaintiff, may never provide the foundation for a libel claim. *Garrison v. Louisiana*, 379 U.S. 64 (1964); *New York Times*, *supra*. In *Bagley*, the Eighth Circuit Court of Appeals reversed judgment in favor of a libel plaintiff because the plaintiff had not been required to prove the falsity of the challenged statements. *Id.*

A libel plaintiff may not succeed by combining the damaging nature of certain true statements with the falsity of other, immaterial statements in order to provide the basis for a libel claim. *AIDS Counseling & Testing Centers v. Group W TV*, 903 F.2d 1000, 1004 (4th Cir. 1990). Summary judgment in favor of the defendant is proper where the statements shown to be false are immaterial. *Id.* However, the "truth" of the challenged statement "must be as broad as the defamatory imputation or 'sting' of the statement." *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1084 (3d Cir. 1988).

> The falsity of a statement and the defamatory "sting" of the publication must coincide—that is, where the alleged defamatory "sting" arises from substantially true facts, the plaintiff may not rely on minor or irrelevant inaccuracies to state a claim for libel.

Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1092 (4th Cir. 1993); *see also AIDS Counseling & Testing Centers*, *supra*, at 1004 ("if the gist or 'sting' of a statement is substantially true, 'minor inaccuracies will not give rise to a defamation

claim' "). Statements must not be judged in isolation, but within the context in which they are made. *Norse v. Henry Holt & Co.*, 991 F.2d 563, 567 (9th Cir. 1993).

Lundell asserts that each of the statements in question is false, or at the very least that there is a genuine issue of material fact as to falsity. First, Lundell asserts that the statement that the "machine . . . does not work" suggests that it was mechanically inoperative, but that the machine does work and always has worked as designed. ABC asserts that the statement that the "machine . . . does not work" meant, in context of the July 2, 1992, report, that the entire trash disposal plan, including tipping fees and sale of recyclable products, was not financially viable. ABC argues that there can be no genuine issue of material fact that the Berrien County waste disposal program was not financially viable.[3] ABC also argues that at best Lundell has suggested an "ambiguity" and such an ambiguity cannot meet the constitutional standards for a libel action. ABC cites *Hepps, supra*, at 776, and *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991), for this last proposition.

The court is not perusaded by ABC's argument. Neither *Hepps* nor *Rooney* held that an ambiguous statement cannot be the basis for a libel action. Rather, both held that where *evidence* of the truth or falsity of a statement was inferential or ambiguous, the constitutional standards had not been met. *See Hepps, supra* at 776; *Rooney, supra,* at 1057. In *Rooney*, the ambiguous evidence was on the question of whether or not Andy Rooney had actually used the product he said "did not work" in a broadcast. *Id.* The parties did not suggest contradictory or ambiguous meanings to the phrase, "did not work." *Id.* What is ambiguous in the present case is the meaning of the statements, not the evidence as to their truth.

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[3] ABC argues that Vernon Lundell, in deposition testimony, conceded that the County's waste disposal system was not financially viable. Whether he did or not, Vernon Lundell's statement is not a concession that the challenged statement, that the machine "does not work," means what ABC says it does.

Similarly, ABC argues that the Ninth Circuit Court of Appeals held in *Norse, supra*, at 567, that where a libel plaintiff concedes the underlying accuracy of the challenged statement, but attributes a different meaning to it, the plaintiff has not demonstrated falisty. Rather, the holding in *Norse* was that "because [the plaintiff] does not dispute the accuracy of the [challenged statement], but rather ascribes to the statement a meaning *it does not carry*," summary judgment in favor of the defendant should be granted. *Norse, supra*, at 567-68 (emphasis added). The phrase "does not work" in the context of the report presently being challenged could reasonably carry the meaning Lundell has offered.

Furthermore, because determination of the gist or "sting" of a challenged statement is necessary to resolution of a libel claim, in determining whether a statement is true, the first question the court must ask is: what did the defendant say? *Schiavone Constr. Co., supra*, at 1084. In *Schiavone*, the Third Circuit Court of Appeals "perceive[d] a range of possible answers" to that question, including both the interpretation of the challenged statement offered by the plaintiff and the one offered by the defendant. *Id.* The court concluded that "a jury must resolve the question of the sting because reasonable persons could differ on that question." *Id.* ABC argues that no reasonable jury could give the challenged statements the meaning Lundell offers in the context in which the statements are offered. The court does not agree. The context of the first challenged statement is illustrative. Rebecca Chase's report begins by stating

> [i]n this south Georgia county of tobacco farms and pecan groves, taxpayers are angry that they are stuck with a 3 million dollar debt *for this garbage recycling machine that they never approved and does not work.*

The report at least arguably states that it is the machine itself that does not work.[4] It is not until almost one-third of the way

[4] The statement is also inaccurate to the extent that it could be interpreted as stating the cost of the Lundell machine to be $3 million. The record demonstrates that the cost of the Lundell machine was

through the report that any implication arises that the machine is functioning adequately, but that other factors are involved.[5] The court concludes that there is a genuine issue of material fact for the jury to decide as to what is meant by the statement that the machine "does not work," and as a consequence, whether that statement is either false or substantially true.

The court concludes that there is also a genuine issue of material fact as to the falsity or substantial truth of the second of the challenged statements. The record shows that there is a dispute as to whether or not fuel pellets made by the Lundell machine were sold,[6] which precludes summary judgment on the falsity or substantial truth of the statement that "no one found a buyer" for those pellets.

As to the third challenged statement, Lundell appears to challenge the *implication* that trash must be hauled to another

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$1,012,877.74. The total cost of the project, including set-up of the waste disposal project, the Lundell machine, operation of the Authority, and interest on the revenue bonds issued by the Authority is approximately $3 million.

[5] Rebecca Chase explains at that point, while showing another Lundell machine in Tennessee, that the Berrien County machine was supposed to "work" by both sorting the trash *and* "paying for itself by selling the recycled materials and charging user fees." It is still not clear at this point in the report whether the Berrien County machine failed the first or second criterion. The next statement is by Commissioner Joe Stallings. Stallings says, "There's nothing physically wrong with the machine. It's the people." ABC places great weight on Stallings's statement as showing that the "sting" of the report was not whether the machine was operable, but whether it was financially viable. Stallings's statement could at least arguably be interpreted by a jury as an excuse or shifting of the blame for buying a machine that did not function properly.

[6] Lundell argues that the record shows that Archer Daniels Midland did purchase a substantial amount of fuel pellets over some time. ABC argues that its statement in the report that "no one found a buyer" is merely inaccurate, not false, if there was only one buyer of fuel pellets during the time the Lundell system was working in Berrien County. ABC points to the undisputed fact that there were unsold fuel pellets stored on the Authority's property. The court concludes that if a jury finds that there was even one buyer of fuel pellets, the categorical statement that "no one found a buyer" would be false, not merely inaccurate.

county because the Lundell *machine* does not work. ABC asserts that the last challenged statement must be considered in the context of financial viability of the entire trash recycling program. It is undisputed that the County at the time of the report had trash hauled to another county. Where a plaintiff challenges a statement on the falsity of the implications, rather than the facts literally related by the statement, the

> defamatory implication must be present in the plain and natural meaning of the words used. *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 82 S.E.2d 588, 591-92 (1954). Moreover, because the constitution provides a sanctuary for truth, a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true. The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference. *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990).

Chapin, supra, at 1092. The court concludes that, although the third challenged statement might "be reasonably read to impart the false innuendo," Lundell cannot as a matter of law meet the requirement that the statement "also affirmatively suggest that the author intends or endorses the inference." The third challenged statement affirmatively suggests that as a result of the entire chain of events, trash must now be hauled to another county. Both of the other challenged statements refer directly to the Lundell machine, its cost, function, or products it produces, and therefore "by inference or innuendo at least refer in an intelligent way to" Lundell. *Boardman & Cartwright v. Gazette Co.*, 281 N.W. 118, 120 (Iowa 1938). The third challenged statement does not. ABC's motion for summary judgment must be granted to the extent that any of Lundell's claims for relief are based on the third challenged statement.

The court concludes that there is a genuine issue of material fact as to the falsity or substantial truth of the first two

challenged statements. ABC's motion for summary judgment on the falsity or substantial truth of these statements must be denied. ABC's motion for summary judgment must be granted as to the third challenged statement.

C. Liability For Damages

In addition to proving the falsity of the challenged statements, the libel plaintiff must meet the standards of recovery applicable to the plaintiff's status as either a public or private figure. *Bagley, supra*, at 643. If the libel plaintiff is a public figure, and the allegedly libelous statements involve a matter of public concern, the plaintiff must prove "actual malice," as defined in *New York Times*, on the part of the defendant to recover any damages. *Gertz, supra*, at 335-36; *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162 (1967); *New York Times, supra*, at 279-80. The private figure plaintiff must prove *New York Times* "actual malice" by clear and convincing evidence in order to recover presumed or punitive damages, *Bagley, supra*, at 647, but to recover actual damages, the private figure plaintiff must only establish the "fault" of the defendant in publishing false statements. *Id.; see also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Because the standards of recovery for presumed or punitive damages applicable to a private figure encompass the more stringent standards for recovery of any damages by a public figure, the court's analysis here is made in terms of a private figure plaintiff.

1. Proof Of Fault

The United States Supreme Court concluded that states should be given significant leeway in providing legal remedies to defamed private individuals both because they were more deserving of recovery and because they were more vulnerable to injury. *Bagley, supra*, at 643.

> With this in mind, the Court left the states largely free to develop standards of recovery applicable to private figures, limited only by the requirement that the states not impose liability without fault. [*Gertz, supra,*] at 347, 94 S.Ct. at 3010.

Id. at 643-44. Iowa has adopted a negligence standard for private plaintiffs in a defamation or libel action. *Jones v. Palmer Communications, Inc.*, 440 N.W.2d 884, 898 (Iowa 1989).

> Even though we adopt a negligence standard, we are aware of the special protection traditionally provided to the media. We respect the essential role that the media play in preserving our democratic rights. The balance between the public interest in the free press and the protection of a private individual injured by defamation can be maintained by a standard of negligence which takes into account the unique role of the press. *Here, we apply the professional standard of care, which is that degree of care which ordinarily prudent persons in the same profession usually exercise under similar conditions. The private plaintiff must establish by a preponderance of the evidence that this standard of care has been breached.*

Id. (Citations omitted; emphasis added). If Lundell is a private figure, Lundell will therefore have to show by a preponderance of the evidence that ABC's employees breached the standard of care of reasonably prudent professional broadcast news employees in broadcasting the July 2, 1992, report.

The *Palmer Communications* court went on to identify several factors that the finder of fact should consider to determine if the above standard of care has been breached by a media defendant:

> 1. Whether the material was topical and required prompt publication, or whether sufficient time was available for a thorough investigation of its contents;
>
> 2. The newsworthiness of the material and public interest in promoting its publication;

3. The extent of damage to the plaintiff's reputation should the publication prove to be false;

4. The reliability and trustworthiness of the source.

Id. (citing *Restatement (Second) of Torts*, § 580B, comments g and h). The thoroughness of the accuracy check a reasonable person would make before publishing a defamatory statement will vary, depending on the relative weight of these factors and the circumstances of the case. *Id.* Ordinarily, issues of negligence are not susceptible of summary adjudication but should be resolved by trial in the ordinary manner. *Id.*

ABC argues that Lundell cannot meet this standard. First, ABC argues that its employees checked facts, reviewed documents, and conducted interviews in an extensive investigation before broadcasting the July 2, 1992, report. Second, ABC argues that Lundell has not designated an expert witness from whom testimony could be elicited on the professional standard of care and its breach in this case.

Lundell argues that ABC was negligent because its employees never consulted David Gaskins, the Authority's recycling plant manager, about such facts as whether or not the machine functioned properly or if there was a buyer for the fuel pellets it produced. Members of an ABC camera crew did talk to Gaskin while shooting videotape of the Lundell machine for the story. Lundell asserts that some of the people ABC did interview referred ABC to Gaskins if ABC was to get an accurate picture of the recycling project. Lundell asserts that had ABC consulted with Gaskins, he would have told them that the machine functioned properly and that a buyer had been found for every fuel pellet produced over the last nine months before the story was broadcast. Lundell also asserts that Gaskins was one of the most knowledgeable sources concerning operations of the Lundell machine and the County's recycling program, and therefore any reasonable professional would have contacted him prior to airing the report. Lundell also argues that because Gaskin actually told ABC personnel

on the camera crew that the machine was operational, demonstrated the truth of that statement by running the machine, and told them that all of the fuel pellets made in the last nine months had been sold to ADM, ABC had information in its possession before airing the story that tended to cast doubt on the truthfulness of its story. Lundell also argues that expert testimony is not necessary on the standard of care where breach of that standard can be recognized by lay persons.

The court agrees that under Iowa law, it is not necessary to present expert testimony to prove breach of a professional standard of care if negligence can be recognized with the common experience and knowledge of lay persons. *See, e.g.*, *Welte v. Bello*, 482 N.W.2d 437, 441 (Iowa 1992) (no expert testimony required for jury to decide whether doctor breached professional standard of care by injecting incorrect medication resulting in chemical burns); *Oswald v. LeGrand*, 453 N.W.2d 634, 639-40 (Iowa 1990) (no expert required in medical malpractice case for poor patient relations); *Devine v. Wilson*, 373 N.W.2d 155, 157 (Iowa App. 1985) (no expert required in suit against attorney for breach of duty of professional care). The court concludes that whether or not ABC met the standards of professional care articulated above in this case is within the capabilities of a jury to determine. There is also a genuine issue of material fact as to whether ABC conducted an adequate investigation when it failed to interview the manager of the plant that was at the center of the controversy it was reporting on and ignored the information the plant manger provided to the ABC camera. Whether or not Lundell can make the requisite showing of fault in this matter is therefore for the jury to decide.

2. Actual Damages

ABC argues that even if Lundell could prove fault, Lundell could not prove any actual damages. ABC argues that Lundell's "actual damages" are limited to special damages or actual pecuniary loss. ABC argues that Lundell has cited only two "prospective sales" that were lost as a result of the July

2, 1992, report. ABC asserts that neither of these prospective customers was ever conducting more than preliminary negotiations with Lundell and that both ultimately decided not to buy recycling equipment from any manufacturer. Thus, ABC argues, no sale would have occurred whether or not the report had been broadcast.

Lundell argues that there is no such limitation of actual damages to special damages or actual pecuniary loss. Rather, Lundell argues, actual damages include damage to reputation and standing in the community, humiliation, mental anguish and suffering. Lundell asserts that there is a genuine issue of material fact as to such damages in this case and as to damages for lost sales.

The court concludes that *Gertz* does stand for the proposition that actual damages in a libel case are not limited as ABC argues. *Gertz*, *supra*, at 350. The Court in *Gertz* stated,

> We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

Id. Lundell has put forward the affidavits of Vernon Lundell and Nat Mundy as evidence of reputational damage to Lundell as the result of the ABC report and as evidence that specific sales were lost as the result of the report. The court concludes that there is a genuine issue of material fact as to Lundell's actual damages precluding summary judgment on that issue.[7]

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[7] The court is concerned with the adequacy and admissibility of Lundell's evidence of lost profits and lost investment. Such evidence must be more than speculative to create a jury question. Nonetheless,

3. Actual Malice

Finally, ABC argues that Lundell cannot make the requisite showing of "actual malice" to be entitled to presumed or punitive damages, if Lundell is a private figure, or to any damages, if Lundell is a public figure. ABC argues that its extensive pre-broadcast investigation precludes a finding of actual malice. Furthermore, ABC argues, none of its employees entertained serious doubt concerning the truth of the broadcast. Lundell argues that ABC's investigation was flawed because ABC did not heed contrary information or pursue sources suggested by others that would have cast considerable doubt on the truth of its broadcast.

"Malice" under *New York Times* does not refer to ill will. *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1433 (8th Cir. 1989). The primary focus must be on the defendant's attitude toward the truth of the statements, rather than on the defendant's attitude toward the plaintiff. *Id.* A statement is made with "actual malice" if it is made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Bagley*, *supra*, at 643 (citing *New York Times*, *supra*, at 279-80). The actual malice standard must be established by clear and convincing evidence. *Id.*

The lack of *New York Times* actual malice is proper ground for summary judgment and the judge must "view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby*, 477 U.S. 242, 254 (1986). Nonetheless, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. The inquiry for the trial judge on a motion for summary judgment is

> whether the evidence presented is such that a jury applying the evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute

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Lundell has not yet been put to the proof on these issues. The question here is whether Lundell can prove actual damages as identified in *Gertz*. The court concludes that there is at least as genuine issue of material fact on actual damages.

> concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

Id. at 255-56.

Malice in this context exists only if the defendant knowingly falsifies or "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1195 (9th Cir. 1989). The standard is based on the defendant's actual state of mind, and the recklessness of the conduct is not measured by whether a reasonably prudent person would have published the material or would have investigated before publishing it. *Price*, *supra*, at 1441 (citing *Secrist v. Harkin*, 874 F.2d 1244, 1252 (8th Cir. 1989), and *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 478 (8th Cir. 1987), *cert. denied*, 485 U.S. 970 (1988)); *Schiavone*, *supra*, at 1089 (citing *St. Amant*, *supra*, at 731). Thus, "reckless disregard for the truth" means that defendant had a "subjective awareness of probable falsity." *Id.* (citing *Gertz*, *supra*, at 335 n.6). The focus is on the information within the defendant's possession. *Price*, *supra*, at 1433 (citing *St. Amant*, *supra*, at 733).

A plaintiff may "rarely be successful in proving awareness of falsehood from the mouth of the defendant himself." *Herbert v. Lando*, 441 U.S. 153, 170 (1979). A defendant subject to the actual malice standard "cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true." *St. Amant*, *supra*, at 732; *Schiavone*, *supra*, at 1090. Therefore, ABC's assertions that none of its employees had any doubts as to the truth of the story is to no avail. Objective circumstantial evidence can suffice to demonstrate actual malice. *Schiavone*, *supra*, at 1090; *Bose Corp. v. Consumers Union of United States*, 692 F.2d 189, 196 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984)

("A court typically will infer actual malice from objective facts. . . . These facts should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inference supports the existence of actual malice.").

More specifically, mere evidence that a media defendant did not investigate properly does not rise to the level of actual malice. *Curtis Publishing Co.*, *supra*, at 154-54; *New York Times*, *supra*, at 287; *Schiavone*, at 1090. A failure to investigate may sustain liability if there was already good reason to doubt the truth of the information in hand. *Price*, *supra*, at 1433 (citing *St. Amant*, *supra*, at 733). Neither an erroneous interpretation of the facts nor the fact that the information presented turns out to be false allows an inference of actual malice. *Schiavone*, *supra*, at 1090 (citing *St. Amant*, *supra*, at 732, and *Time v. Pape*, 401 U.S. 279, 292 (1971)). However, the actual malice test could be met if the defendant had "obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant*, *supra*, at 732. For example, where the defendant finds internal inconsistencies or apparently reliable information that contradicts its libelous assertions, but nevertheless publishes those statements anyway, the *New York Times* actual malice test can be met. *Curtis Publishing Co.*, *supra*, at 161 n.23; *Schiavone*, *supra*, at 1090. Actual malice might also be found where there was evidence that the story was fabricated, it was inherently improbable, the sources were entirely anonymous and their reports unverified, or if there were particular reasons to doubt sources. *Price*, *supra*, at 1445.

The court concludes in this case that there is a genuine issue of material fact generating a jury question as to actual malice. A reasonable jury could conclude that ABC acted with actual malice in failing to interview the Authority's plant manager, the person with the most firsthand information concerning the operation of the Lundell machine, the sale of recyclable products produced by the machine, and general operation of the Authority's recycling program, and pre-

sumably the person with custody of relevant records of operation and sale of products from the Lundell machine. ABC failed to interview this person even after others ABC contacted referred ABC to him as the best source of accurate information on certain points at issue here. Failure to contact the plant manager is evidence of negligence, could have been motivated by a desire not to cloud the waters by discovering or presenting contradictory evidence, and could indicate an intent to publish the report without regard to its truth.

More importantly, ABC had information available to it prior to the broadcast that created internal inconsistencies or contradictions that, a jury could find, should have cast doubt on the truth of its story. According to the deposition of Gaskins, the plant manger, Gaskins told the ABC camera crew that the machine was operational in response to the statement of a member of the camera crew that they had heard that the machine was broken down. Deposition of David Gaskins, p. 7. Gaskins then demonstrated that the machine was operational by running garbage through it. *Id.* A member of camera crew also asked if the Authority had sold any of the fuel pellets. *Id.* at p. 8. Gaskins told him that all of the pellets made in the last nine months had been sold to ADM in Valdosta, Georgia.[8] *Id.* Rebecca Chase testified in deposition that she had been unable to confirm that any fuel pellets had been sold to ADM because ADM did not return several of her telephone calls, and, when they did, would not confirm anything, but referred her to the corporate public relations office in Decatur, Illinois. Deposition of Rebecca Chase Williams, p. 45.

Rebecca Chase also testified that other information in ABC's possession prior to the broadcast of the story indicated that there was a buyer for the fuel pellets produced by the

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[8] Gaskins further explained in his deposition that the fuel pellets stored on the site, all produced prior to Gaskins's employment by the Authority, had gotten wet, and therefore could not be sold as fuel, and, until they could be reshredded, could not be reused in making more fuel pellets. It is unclear from the deposition testimony whether Gaskins also conveyed this information to the ABC camera crew.

Lundell machine in Berrien County. *Id.* at 43-44. Chase testified that ABC had received a copy of a letter from the Georgia Department of Natural Resources dated March 2, 1992, to Mr. Vinson Griffin regarding the Authority's problems with that agency, which stated that, "There is one user of the fuel pellets." *Id.* This statement, presumably reliable, contradicts ABC's broadcast statement that "no one found a buyer" for the fuel pellets.

There is therefore an accumulation of evidence and appropriate inferences that support the existence of actual malice in this case. ABC's motion for summary judgment on the issue of actual malice must be denied.

Upon the foregoing,

IT IS ORDERED

That defendants' February 7, 1994, motion for summary judgment (docket number 41) is granted to the extent that plaintiff's claims founded on the third challenged statement are dismissed and denied in all other respects.

April 13, 1994.

/s/ JOHN A. JARVEY
John A. Jarvey
Chief Magistrate Judge
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3473NISC
November 26, 1996

LUNDELL MANUFACTURING CO., ETC.,

Appellant,

—VS.—

AMERICAN BROADCASTING COMPANIES, ETC.,

Appellee.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Chief Judge Richard S. Arnold, Judge McMillian, and Judge Murphy would grant the suggestion.

The petition for rehearing by the panel is also denied.

Judge Magill took no part in the consideration or decision of this case.

Order Entered at the Direction of the Court:

/s/ MICHAEL E. GANS
Clerk, U.S. Court of Appeals, Eighth Circuit

SUPREME COURT, U.S.
FILED
MAR 17 1997
CLERK

No. 96-1342

In The

Supreme Court of the United States

October Term, 1996

AMERICAN BROADCASTING COMPANIES, INC.,

Petitioner,

v.

LUNDELL MANUFACTURING COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Court modify the limited purpose public figure test of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and create a special rule that persons who sell goods to government entities are deemed to be limited purpose public figures for defamation purposes?

2. Should the Court modify the limited purpose public figure test of *Gertz v. Robert Welch, Inc.*, to remove the requirement that the defamation plaintiff attempt to influence the resolution of the particular public controversy giving rise to the defamatory speech?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, respondent informs the Court of the following:

Lundell Manufacturing Company, Inc. ("Lundell") is a wholly owned subsidiary of Lundell Technologies, Inc. Lundell has no non-wholly owned subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Lundell Manufacturing Company, Inc. ("Lundell") respectfully requests that the court deny the petition for writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered October 15, 1996. The decision of the Eighth Circuit is reported at 98 F.3d 351 and is reprinted in the appendix of the Petition beginning at 1a.

STATEMENT OF THE CASE

The Petition of American Broadcasting Companies, Inc. ("ABC") is premised on an issue ABC presented in the Court of Appeals as an alternative to its primary arguments, which were: (1) that its broadcast concerning Lundell was not actionable because it was substantially true, and (2) that the Court of Appeals should undertake an independent review of the entire record on the substantial truth issue. (98 F.3d at 355, 359, 362; App. 5a, 13a, 19a) ABC shifted its emphasis and raised only the public/private figure issue in its Petition for Rehearing and Suggestion for Rehearing En Banc. The three judge panel[1] of the Eighth Circuit Court of Appeals denied the Petition for Rehearing and seven of the ten participating circuit judges rejected the suggestion for rehearing en banc. (App. 63a)

Lundell brought a defamation action against ABC for a story which aired nationwide on July 2, 1992 on the

[1] Circuit Judges Wollman, John R. Gibson and Hansen (98 F.3d 354; App. 2a)

ABC network program "World News Tonight with Peter Jennings." The story concerned Berrien County, Georgia's experience with a solid waste recycling machine manufactured and sold by Lundell. The story stated that the recycling machine "does not work." (R. 1-5, 116) When Lundell demanded a retraction, ABC took the position that the statement was true because the machine was mechanically inoperable. (R. 120; App. 17a) Subsequently ABC conceded that the machine was mechanically sound but argued the machine did not work in the sense that it was not financially viable. (App. 4a, 17a) The jury found the statement to be false. (R. 74-75, 80)

A. Course of Proceedings and Disposition of the Case Below.

There was public controversy in Berrien County over its garbage problems and the use of local revenue bonds to fund a solution. (R. 363-366) However, there was no evidence that Lundell tried to influence that public controversy. At trial, ABC's reporter for the story admitted that her investigation for the story uncovered no evidence that the people at Lundell had attempted to inject Lundell into the political debate in Berrien County over these issues. (R. 497) Lundell made it clear to the ABC reporter that Lundell stayed out of the dispute because it was purely political. (R. 497) The trial court found Lundell to be a private figure:

> Lundell is a private-figure plaintiff, and I've not seen anything to change my opinion on that in the evidence here this week. Lundell has not thrust itself into public controversy. In fact, the evidence is that they – what evidence there is on

> that subject is that it attempted to avoid that, the public controversy in Berrien County, Georgia. The mere fact that Lundell Manufacturing sold to a government entity is not sufficient evidence to establish that it is a public figure. (App. 41a)

After an eight day trial, the jury found the "does not work" statement to be false and negligently made and awarded Lundell actual damages of $158,000 for lost profits and $900,000 for injury to its business reputation.[2] (R. 74-75, 80) ABC filed a Renewed Motion for Judgment as a Matter of Law asserting twelve separate grounds for setting aside the jury's verdict, including the claim that Lundell should be deemed a public figure. (R. 86-89) The trial court granted ABC's Motion for Judgment as a Matter of Law on the ground that the challenged statement in the broadcast was substantially true. (App. 31a-36a) Addressing the public figure issue the trial court stated:

> Again, the court is convinced that Lundell is a private figure plaintiff as it has never thrust itself into public controversy and has simply sold machines to industries or endeavors that are significantly regulated. Lundell never attempted to influence the outcome of the public controversy in Berrien County, Georgia. When controversy arose, Lundell refused to get involved. (App. 30a)

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[2] Lundell was assigned the burden of proving falsity under *Philadelphia Newspaper, Inc. v. Hepps*, 475 U.S. 767 (1986). Iowa has adopted a professional negligence standard for private-figure plaintiffs suing media defendants, *Jones v. Palmer Communications, Inc.*, 440 N.W.2d 884 (Iowa 1989) pursuant to *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Lundell appealed the trial court's judgment as a matter of law for ABC to the United States Court of Appeals for the Eighth Circuit. In an opinion filed October 15, 1996 (98 F.3d 351) the Eighth Circuit reversed, holding substantial evidence supported the jury's finding that the statement was false. (98 F.3d at 362; App. 18a-19a) The court ordered reinstatement of the jury verdict for Lundell. (98 F.3d at 366; App. 26a)

In considering ABC's alternative argument that Lundell was a public figure, the Court of Appeals analyzed the issue under the test set down in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), as previously followed by the Eighth Circuit in *In Re IBP Confidential Business Documents Litigation* ("Bagley"), 797 F.2d 632, 645 (8th Cir. 1986):

> In determining whether an individual should be considered a limited public figure, we must focus our attention on the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Gertz*, 418 U.S. at 352, 94 S.Ct. at 3013. By doing so we then can determine whether the individual has voluntarily and purposefully injected himself into that controversy in an attempt to influence the resolution of that controversy. *Id.* at 345, 94 S.Ct. at 3009-10.

(98 F.3d at 362-363; App. 19a-20a) The Court of Appeals, applying the *Bagley* decision, first identified the public controversy giving rise to the defamatory speech. "Here, the particular controversy giving rise to ABC's report was the garbage disposal problem in Berrien County." (98 F.3d at 363; App. 20a) The court then continued the analysis:

> After identifying the particular controversy giving rise to the defamation, we then examine the

> "nature and extent" of Lundell's involvement. *Bagley*, 797 F.2d at 645. This inquiry is necessary to determine whether Lundell has "thrust [itself] to the forefront of [this] particular public controvers[y] in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345, 94 S.Ct. at 3009. (98 F.3d at 363; App. 20a)

The Court of Appeals concluded:

> Lundell did not inject itself in the Berrien County controversy. . . . Indeed Chase admitted that she 'did not uncover any evidence from any source that [Lundell] had attempted to inject [itself] into [the] political debate of Berrien County.' . . . ABC does not direct us to any evidence that Lundell placed itself into the controversy to influence the issues involved.

(98 F.3d at 364; App. 22a) ABC's alternative argument that Lundell was a limited purpose public figure was rejected by the Court of Appeals. (98 F.3d at 364; App. 22a)

ABC filed a Petition for Rehearing With a Suggestion For Rehearing En Banc. In an order entered November 26, 1996 the Court of Appeals denied the Petition for Rehearing and the Suggestion for Rehearing En Banc. (App. 63a)

B. Correction of Misstatements in the Petition.

Pursuant to Supreme Court Rule 15.2, respondent brings the following misstatements of fact and law contained in the Petition to the court's attention.

ABC claims in the Petition that Lundell had "knowledge of the heated public controversy concerning garbage disposal in Berrien County at the time it sought and

obtained a contract with the county to address that problem." (Petition at 7) There was no evidence presented at trial to support this contention. No witness testified that Lundell had such knowledge.

ABC apparently is relying on another misstatement of the trial evidence to support this "knowledge" contention. ABC refers in its Petition to Lundell's "own contemporaneous news clippings file" as evidence that Lundell had knowledge of the controversy before it sold its machine because some of the clippings in the file predated the sale. (Petition at 4 and 7) Again, no evidence was adduced at trial that Lundell was collecting news clippings on the Berrien County controversy before it sold its machine. Vernon Lundell, President of Lundell, testified that he had not even seen the clippings until a few months before the trial in 1994, 6 years after Lundell sold the machine. (R. 289-90)

While Lundell's knowledge of the pre-existing controversy is not relevant to the determination of its public figure status,[3] ABC suggests that the Court of Appeals overlooked this "evidence" in finding Lundell to be a private figure. (Petition at 7) In fact, ABC did not raise

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[3] As the Court of Appeals decision correctly held, it is the plaintiff's role in the controversy, not the controversy itself, that is determinative of public figure status. (98 F.3d at 364; App. 22a) In *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979) the Supreme Court held: "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." 443 U.S. at 167, 99 S.Ct. at 2707.

the argument below that Lundell's pre-existing knowledge of the controversy determines its public figure status. The Court of Appeals found Lundell to be a private figure because ABC presented no evidence at trial that Lundell injected itself into the controversy or that Lundell attempted to influence the resolution of the controversy. (98 F.3d at 364; App. 22a)

ABC makes additional misstatements with regard to the local publicity surrounding the Berrien County garbage controversy. ABC makes the assertion that "much" of the local media coverage "referred to Lundell and its machinery by name or description." (Petition at 4) The assertion is entirely unsupported by a review of the newspaper articles. Of the approximately *60* articles introduced at trial, only two refer to Lundell by name – one reporting that Lundell would be out to check the equipment and install a new aluminum sorter (R. 1080), and one reporting a Lundell representative would be present for initial startup of the equipment. (R. 1087) All the other media attention concerned local government financing, what participating governments would be charged for hauling in garbage, and whether a voter referendum was necessary for revenue bond financing. (R. 1079-81; 1083-89; 1094-1146) Both the trial court and Court of Appeals found that ABC presented no evidence that Lundell injected itself into these issues or attempted to influence their resolution. (98 F.3d at 364; App. 22a, 30a) ABC does the court a grave disservice in attempting to mischaracterize local media coverage of the controversy and Lundell's role.

ABC makes the claim in its Petition that "Lundell presented its machine, in its own words" as the "solution" to Berrien County's garbage problem. (Petition at 4) ABC neglects to inform the court that Lundell's statement was not publicized in Berrien County, but is merely a slogan used by Lundell in an advertising brochure. (R. 287-288) Lundell did not make this claim in the context of the public debate in Berrien County.

ABC now claims that the public controversy in Berrien County included allegations that the county commission chairman received a commission from Lundell and was later employed as a sales representative by Lundell. (Petition at 4) These charges were so insignificant that ABC did not include either one in its broadcast, (R. 116), and did not argue below that either allegation made Lundell a public figure. Neither allegation appeared in any of the local media articles. (R. 1079-81; 1083-89; 1094-1146)

ABC relies on these factual misstatements to erroneously imply that the Court of Appeals was slipshod in its review of the trial evidence of Lundell's participation, or, more accurately, lack of participation, in the Berrien County controversy. Of equal concern is ABC's persistent mischaracterization of the basis for the Court of Appeals holding that Lundell was not a public figure.[4] The mischaracterization of the Eighth Circuit's opinion is discussed in the next portion of this brief.

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[4] ABC consistently and erroneously states in its Petition that Lundell "thrust" itself into the Berrien County controversy. The trial court and the Court of Appeals found to the contrary. (98 F.3d at 364; App. 22a, 30a)

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT HAS NOT ADOPTED A "SPEECH" TEST FOR DETERMINING WHO IS A LIMITED PURPOSE PUBLIC FIGURE.

Throughout its Petition ABC asserts that the Court of Appeals grounded its decision solely on the fact that Lundell did not speak about the controversy; or avoided comment on the controversy; or chose not to debate the issues; or declined to speak to the press. (Petition at 3, 9, 10, 15)

A review of the Court of Appeals decision demonstrates that nowhere in its opinion did the Court of Appeals adopt a "speech" requirement. (98 F.3d at 362-364; App. 19a-22a) ABC points to no portion of the opinion or any specific language employed by the court to support its characterization of the Court of Appeals holding. ABC erects this strawman to support its argument that the Court of Appeals has created (or exacerbated) a split among the circuits on the *Gertz* limited purpose public figure test. An accurate reading of the Court of Appeals opinion below, and a review of the circuit cases relied on by ABC, dispels any notion of a conflict.

II. THE CIRCUITS HAVE CONSISTENTLY APPLIED THE TEST OF *GERTZ V. ROBERT WELCH, INC.* IN DECIDING THE FACT-BOUND LEGAL ISSUE OF WHETHER A DEFAMATION PLAINTIFF IS A LIMITED PURPOSE PUBLIC FIGURE.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) the court recognized that fact-specific rules for determining a defamation plaintiff's status would be unworkable:

> Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority. 418 U.S. at 343-44.

The court in *Gertz* held that those persons deemed limited purpose public figures "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." 418 U.S. at 345. In determining the issue the court looks to "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." 418 U.S. at 352. The court held that an attorney representing a client in connection with a highly publicized matter was not a public figure where, "He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." *Id.*

The circuits are in uniformity in their adherence to the *Gertz* analysis. The Court of Appeals opinion below

relied on *Gertz* as interpreted by the prior en banc decision of the Eighth Circuit in *In Re IBP Confidential Business Documents Litigation ("Bagley")*, 797 F.2d 632 (8th Cir. 1986). ABC makes no suggestion in its Petition that *Bagley* departed from the *Gertz* test. In *Bagley* the Eighth Circuit explained the *Gertz* requirement that the court focus its attention on the "nature and extent of an individual's participation in the particular (public) controversy giving rise to the defamation." 797 F.2d at 644, citing *Gertz*, 418 U.S. at 352:

> By doing so, the court will be able to determine whether the individual has voluntarily and purposefully injected himself into the controversy in an attempt to influence resolution of the issues there involved.

797 F.2d at 644-45, citing *Gertz*, 418 U.S. at 345, 351. The Court of Appeals decision below recognized that this is the relevant inquiry under *Gertz*. (98 F.3d at 363, App. 20a)

ABC argues that decisions in the Third and Fifth Circuits conflict with the Eighth Circuit decision below. A review of those decisions and their facts dispels any notion of a conflict.

In *Trotter v. Jack Anderson Enterprises, Inc.*, 818 F.2d 431 (5th Cir. 1987), the Fifth Circuit followed the *Gertz* definition of a limited purpose public figures as those who "thrusts themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." 818 F.2d at 433 (quoting *Gertz*). The plaintiff was an American lawyer and president of a Guatemalan soft drink bottler. The bottling company was

plagued by violence associated with attempted unionization. The allegedly defamatory news article identified the company, and the plaintiff in particular, as orchestrators of the violence. 818 F.2d at 434. The first article reported on proposals made by some Coca-Cola shareholders concerning the labor troubles. *Id.* Later articles by other authors reported that the shareholders charged that the labor troubles in Guatemala included murder, bribery, and other abuses. *Id.* at 434.

The Fifth Circuit held that the plaintiff was a limited purpose public figure, finding th he played a prominent role in the controversy through his "major responsibility" for the company's labor policy. There was evidence of his behind the scenes influence in the form of a letter from the President of Guatemala threatening plaintiff with expulsion from the country if there were further deaths of union officials. 818 F.2d at 435. The court, as required by *Gertz*, also noted that plaintiff "undertook important efforts to influence the resolution of the shareholder protests." *Id.*

> After he was encouraged by Coca-Cola headquarters to discuss the shareholder resolutions with their authors, he met with them in Chicago in 1977 and in Guatemala in 1978. Trotter also suggested to Coca-Cola that he bring a defamation suit against the authors of the resolutions in order to squelch their activities.

818 F.2d at 435.

The Fifth Circuit's holding in *Trotter* is consistent with *Gertz* and the Eighth Circuit decision in the present case where the inquiry in all three cases is the same – Did the plaintiff "thrust himself to the forefront of a particular

public controversies to influence resolution of the issues involved?" *Gertz*, 418 U.S. at 345.

ABC points also to *McDowell v. Paiewonsky*, 769 F.2d 942 (3rd Cir. 1985), as a decision in conflict with the Court of Appeals decision below. ABC argues that in *McDowell*, "The Third Circuit rejected the very analysis adopted by the Eight Circuit." (Petition at 12) In truth, *McDowell* uses the analysis dictated by *Gertz* and followed by the Eighth Circuit in *Bagley* and the present case:

> We have recently set forth a two-part inquiry for determining whether a defamation plaintiff is a limited purpose public figure. The court must consider (1) whether the alleged defamation involves a public controversy, and (2) the nature and extent of plaintiff's involvement in that controversy.

McDowell, 769 F.2d at 948. (See *Gertz*, 418 U.S. at 352; *Bagley*, 797 F.2d at 644; 98 F.3d at 363; App. 20a)

As one would expect, the facts in *McDowell* differ radically from the facts of the present case. The plaintiff in *McDowell* was an architect who had "a long history" of work on public building projects in the U.S. Virgin Islands. 769 F.2d at 944. In a weekly radio address the defendant Paiewonsky, a senator in the Virgin Islands legislature, made allegedly defamatory remarks concerning the plaintiff's performance on various public building projects. 769 F.2d at 944, 948. The Third Circuit held the plaintiff to be a limited purpose plaintiff figure because

the *plaintiff* and his work on government projects[5] had been the subject of considerable media attention for at least three years preceding the broadcast. One public project had been the subject of two government investigations. A published report by the Attorney General for the Virgin Islands was critical of McDowell in his role as architect on the project. The United States Comptroller for the Virgin Islands published a report on the same project which detailed inadequacies of the architectural plans as a reason for the problems and delays in the project. The Third Circuit concluded:

> Unlike the plaintiff in *Hutchison,*[6] McDowell was the subject of significant public notoriety and scrutiny well before the allegedly defamatory broadcast. . . . Thus it is difficult to maintain that plaintiff was not the subject of intense public attention and a personality of some prominence prior to the April 24 broadcast.

759 F.2d at 949. ABC can point to no evidence demonstrating that Lundell was the subject of "significant notoriety and public scrutiny" or "intense public attention" prior to the ABC broadcast. Media interest in the Berrien County political controversy did not include interest in Lundell or the operational capabilities of its machine. There was no controversy concerning the merits of Lundell's machine until ABC falsely reported that it "does not work."

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[5] The Third Circuit approved the lower court's holding that merely working on government contracts does not transform a person into a limited purpose public figure. 769 F.2d at 949.

[6] *Hutchison v. Proxmire,* 443 U.S. 111 (1979).

Different outcomes from different facts do not evidence a split within the circuits. The inquiry into public figure status is always fact-bound and situation specific. The *Gertz* court recognized that the issue requires consideration of those diverse fact patterns in the context of "broad rules of general application."

ABC's contention of a split among the circuits on the issue, like its contention that Lundell is a limited purpose public figure, fails for lack of evidence.

III. THE RULE SOUGHT BY PETITIONER – TO IMPOSE PUBLIC FIGURE STATUS ON PERSONS WHO SELL GOODS TO GOVERNMENT ENTITIES WITHOUT ATTEMPTING TO INFLUENCE PUBLIC CONTROVERSIES – WOULD UPSET THE BALANCE THAT *GERTZ V. ROBERT WELCH, INC.* AND ITS PROGENY STRIKE BETWEEN FIRST AMENDMENT CONCERNS AND THE STATE'S INTEREST IN PROVIDING A REMEDY FOR DEFAMATORY FALSEHOODS.

The facts of the present case are that Lundell sold its machine to a government entity and made no effort to influence an ongoing local political debate over garbage disposal issues. (98 F.3d at 364) Within this factual context ABC argues for a rule that would transform Lundell and others similarly situated into public figures for defamation purposes. While such a rule would presumably be welcomed by ABC and other media concerns, since it would geometrically expand their protection for negligent publication of false (and injurious) statements of fact, the rule would destroy the balance struck by *Gertz* and later cases between legitimate media concerns under

the First Amendment and "the state interest in compensating injury to the reputation of private individuals." *Gertz*, 418 U.S. at 343.

The rule proposed by ABC has two distinct propositions: (1) that persons who sell goods to government entities should be deemed public figures, and (2) that the *Gertz* requirement of attempting to *influence* resolution of a public controversy be abandoned. Adoption of either proposition, or both, would call into question the viability of *Gertz*, and the circuits' uniform reliance on the *Gertz* test.

Gertz requires inquiry into "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." 418 U.S. at 352. Does the mere sale of goods constitute "participation" in a local political controversy? In *Hutchison v. Proxmire*, 443 U.S. 111 (1979), the court held that receipt of government grants for scientific research does not transform the recipient into a public figure. 443 U.S. at 135. The court viewed the Petitioner's argument as requesting a return to the "public or general interest" subject matter test of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 296 (1971) rejected by *Gertz*:

> The 'use of such subject matter classification to determine the extent of Constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area.'

443 U.S. at 135 (quoting *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976)). The *Gertz* focus on the nature and extent of the plaintiff's participation in public controversy is

viewed by the court as striking a fair balance between competing interests of *equal* importance. *Time, Inc. v. Firestone*, 424 U.S. at 456. Adopting a rule that those who sell goods to the government are deemed public figures would destroy the balance that has guided judicial inquiry in this area for the 23 years since *Gertz* was decided.

ABC would have the court hold that selling goods to a local government while a local political controversy is brewing should tip the balance in favor of public figure status for the seller. This focus on the public controversy itself, as opposed to the plaintiff's participation in the controversy, has been rejected. In *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. at 157 (1979), the court observed:

> A private figure is not automatically transformed into a public figure just by becoming involved or associated with a matter that attracts public attention. To accept such reasoning would in effect reestablish the doctrine advanced by the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44, 29 L.Ed.2d 296, 91 S.Ct. 1811 (1971), which concluded that the *New York Times* standard should extend to defamatory falsehoods relating to private persons if the statements involved matters of public or general concern. We repudiated this proposition in *Gertz* and in *Firestone*, however, and we reject it again today.

443 U.S. at 167. The *Wolston* court recognized that a libel plaintiff's attempt to *influence* the public controversy is central to the *Gertz* test:

> Nor do we think petitioner engaged the attention of the public in an attempt to influence the resolution of the issues involved. Petitioner assumed no "special prominence in the resolution of public questions."

443 U.S. at 168 (quoting *Gertz*, 418 U.S. at 351).

For the second prong of its proposed rule, ABC would have the court abandon the "influence" requirement which is central to the *Gertz* analysis. This conclusion is inescapable given the facts of the present case. As the Court of Appeals noted: "ABC does not direct us to any evidence that Lundell placed itself into the controversy to influence the issues involved." (98 F.3d at 364; App. 22a) Abandonment of the "influence" requirement would expand the public figure definition to any person whose name was associated with a public controversy. If participation in the controversy and an attempt to influence its outcome are removed as criteria, the protection this court has provided to private figure libel plaintiffs would vanish.

The determination of a defamation plaintiff's status is a question of federal constitutional law. *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966). Thus the media is afforded the constitutional protection of having judges, as opposed to juries, determine the plaintiff's status. Respondent assumes ABC has not brought its Petition for the purpose of having the Supreme Court review the Court of Appeals decision and the findings of the trial court with regard to Lundell's private figure status. Mr. Justice Harlan, in his dissent in *Rosenbloom*, presaged the court's determination in *Gertz*, 418 U.S. at 343, that case-by-case review of this issue by the Supreme Court is not workable:

> Once the evident need to balance the values underlying each is perceived, it might seem, purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular plaintiff who prevailed. . . . But we did not embrace this technique in *New York Times*, supra. . . . We there announced a rule of general application, not ordinarily dependent for its implementation upon a case-by-case examination of trial court verdicts.

403 U.S. at 63. ABC's invitation for the court to depart from those "broad rules of general application", 418 U.S. at 343-44, laid down in *Gertz* should be declined.

IV. COLLATERAL PROCEEDINGS BELOW COULD RENDER THE PETITION MOOT.

On January 23, 1996, ABC, as principal, and Federal Insurance Company, as surety, filed a bond with the District Court. The bond is styled "Judgment in a Civil Case" and a copy is found at pages 4 - 12 of the Appendix of this Brief. On January 28, 1997, Lundell filed a "Motion to Enforce Surety's Liability on Bond", a copy of which is found at page 1 of the Appendix of this Brief. Lundell's motion asks the District Court to enter judgment on the bond against Federal Insurance Company for either the

amount of the bond ($1,750,000.00) or, alternatively, for the total amount of Lundell's judgment[7] against ABC.

On February 14, 1997, ABC filed a Resistance to the Motion. A copy of ABC's Resistance is found at page 13 of the Appendix of this Brief. ABC did not resist the motion on behalf of the surety, Federal Insurance Company, and the surety has made no appearance or resistance in response to the motion.

While ABC's Petition should fail on its merits, respondent brings the pendency of this matter to the attention of the court as a proceeding which could render ABC's Petition moot. If the lower court enters judgment against the surety upon Lundell's motion, the current controversy between Lundell and ABC could be rendered moot if Lundell succeeds in having its judgment against ABC satisfied out of the bond proceeds.

---

[7] This procedure is authorized by Federal Rule of Civil Procedure 65.1.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

PAUL D. LUNDBERG
Counsel of Record for Respondent
700 Frances Building
505 - 5th Street
P. O. Box 1828
Sioux City, Iowa 51102
(712) 255-4444

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LUNDELL MANUFACTURING COMPANY, INC.,	CASE NO. C92-4060
Plaintiff,	MOTION TO ENFORCE SURETY'S LIABILITY ON BOND
vs.	
AMERICAN BROADCASTING COMPANIES, INC.,	(Filed Jan. 28, 1997)
Defendant.	

The plaintiff, pursuant to Rule 65.1 FRCP, moves for an order enforcing the liability of the surety, Federal Insurance Company, on the bond filed January 23, 1997, wherein American Broadcasting Companies, Inc. is principal. In support thereof, plaintiff states:

1. On January 23, 1997, defendant American Broadcasting Companies, Inc., as principal, and Federal Insurance Company, as surety, filed a Bond in this action reciting that Federal Insurance Company is "held and firmly bound unto Lundell Manufacturing Company, Inc.," in the sum of $1,750,000.00. A copy of the Bond is attached hereto as Exhibit "A".

2. The Bond, Exhibit "A", and the surety's liability thereon is conditioned as follows:

> and said American Broadcasting Companies, Inc. having appealed from said judgment to the Northern District of Iowa, now therefore, in case the said American Broadcasting Companies, Inc.

shall pay said judgment at the direct (sic) of the District Court, and in all respects abide the orders and judgments of the District Court, then this bond is to be void, otherwise to remain in full force and effect.

3. The surety's liability on the Bond is absolute as American Broadcasting Companies, Inc., has not paid the judgment entered December 19, 1996 (as amended January 16, 1997) and any appeal to the "Northern District of Iowa" has been exhausted.

4. Plaintiff requests that the court enter judgment against Federal Insurance Company in the amount of $1,750,000.00, or, alternatively, for the total amount of the judgment, interest and costs accrued herein.

WHEREFORE, plaintiff prays that the court enter judgment against Federal Insurance Company in the amount of $1,750,000.00, or in the alternative, for the total amount of the judgment, interest and costs accrued herein.

SHULL, COSGROVE, HELLIGE
& LUNDBERG

By /s/ Paul D. Lundberg
Paul D. Lundberg
700 Frances Building
505 – 5th Street
P. O. Box 1828
Sioux City, IA 51102
(712) 255-4444

Attorneys for Lundell
Manufacturing Company, Inc.

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on Jan 28 1997

By: U.S. Mail

Signature /s/ Paul D. Lundberg

Copies to:

Kasey Kincaid
Attorney at Law
400 Capital Square
400 Locust Street
Des Moines, IA 50309

Federal Insurance Company
Two Embarcadero Center
Suite 1500
San Francisco, CA 94111

EXHIBIT "A"

FEDERAL INSURANCE COMPANY
(Surety Address for Service) Bond No. 8145-05-71
Two Embarcadero Center, Suite 1500
San Francisco, CA 94111

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LUNDELL MANUFACTURING COMPANY, INC. Plaintiff, v. AMERICAN BROADCASTING COMPANIES, INC., Defendants.	Case No. C 92-4060 JUDGMENT IN A CIVIL CASE (Filed January 23, 1997)

KNOW ALL MEN BY THESE PRESENTS:

That we, AMERICAN BROADCASTING COMPANIES, INC. as principal and FEDERAL INSURANCE COMPANY, as surety, are held and firmly bound unto LUNDELL MANUFACTURING COMPANY, INC., Plaintiff, the sum of ONE MILLION SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($1,750,000.00), which sum, well and truly to be paid to the Plaintiff we hereby bind ourselves firmly by these presents:

The Condition of the above obligation is such that judgment having been found in the United States District Court for the Northern District, on the 19th day of

December, 1996, against AMERICAN BROADCASTING COMPANIES, INC., Defendants: and said matter having been duly tried of said court and found against the Defendants, AMERICAN BROADCASTING COMPANIES, INC. in the amount of ONE MILLION FIFTY EIGHT THOUSAND DOLLARS ($1,058,000.00) having been adjudged by the court on said judgment plus costs and interest and that the bond on appeal be ONE MILLION SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($1,750,000.00) and said AMERICAN BROADCASTING COMPANIES, INC. having appealed from said judgment to the Northern District Court of Iowa, now therefore, in case the said AMERICAN BROADCASTING COMPANIES, INC. shall pay said judgment at the direct of the District Court, and in all respects abide the orders and judgments of the District Court, then this bond to be void, otherwise to remain in full force and effect.

Signed, sealed and dated this 9th day of January, 1997.

AMERICAN BROADCASTING
COMPANIES, INC.

By /s/ Kasey Kincaid

FEDERAL INSURANCE COMPANY

By /s/ Kathy Calvert
Kathy Calvert, Attorney-in-fact

Premium:$3,563.00

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Los Angeles

On January 9, 1997 (Date) before me, Tracy Aston, Notary (Name and Title of Officer (e.g., "Jane Doe, Notary Public")) Public, personally appeared Kathy Calvert----------. (Name(s) of Signer(s))

[X] personally known to me – **OR** – [ ] proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

[SEAL]

WITNESS my hand and official seal.

/s/ Tracy Aston
Signature of Notary Public

——— *OPTIONAL* ———

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____ Number of Pages: ___

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____

_ Individual
_ Corporate Officer
_ Title(s): _____
_ Partner – [ ] Limited [ ] General
X Attorney-in-Fact
_ Trustee
_ Guardian or Conservator
_ Other: _____

_____

Signer Is Representing:

Federal Insurance Company _____

_____

RIGHT THUMBPRINT
OF SIGNER

Top of thumb here

Signer's Name: _____

_ Individual
_ Corporate Officer
_ Title(s): _____
_ Partner – [ ] Limited [ ] General
_ Attorney-in-Fact
_ Trustee
_ Guardian or Conservator
_ Other: _____

_____

Signer Is Representing:

_____

_____

RIGHT THUMBPRINT
OF SIGNER

Top of thumb here

POWER OF ATTORNEY
FEDERAL INSURANCE COMPANY
ATTN: SURETY DEPARTMENT
15 Mountain View Road, Warren, NJ 07059
Telephone: (908) 903-2000
Fax No.: (908) 903-3656

Know all Men by these Presents, That FEDERAL INSURANCE COMPANY, an Indiana Corporation, has constituted and appointed, and does hereby constitute and appoint Daniel Ortiz, E.S. Albrecht, Tracy Aston, Kathy Calvert, C.K. Nakamura and Harriet Lambell of Los Angeles, California

each its true and lawful Attorney-in-Fact to execute under such designation in its name and to affix its corporate seal to and deliver for and on its behalf as surety thereon or otherwise, bonds or obligations (other than Bail Bonds) given or executed in the course of its business, and any instruments amending or altering the same, and consents to the modification or alteration of any instruments referred to in said bonds or obligations.

In Witness Whereof, the said FEDERAL INSURANCE COMPANY has, pursuant to its By-Laws, caused these presents to be signed by its Vice President and Assistant Secretary and its corporate seal to be hereto affixed this 11th day of October 1996

Corporate Seal (SEAL)

/s/ Kenneth C. Wendel
Kenneth C. Wendel
Assistant Secretary

FEDERAL INSURANCE COMPANY

By /s/ Frank E. Robertson
Frank E. Robertson
Vice President

STATE OF NEW JERSEY)
) ss.
County of Somerset)

On this 11th day of October 1996, before me personally came Kenneth C. Wendel to me known and by me known to be Assistant Secretary of FEDERAL INSURANCE COMPANY, the corporation described in and which executed the foregoing Power of Attorney, and the said Kenneth C. Wendel being by me duly sworn, did depose and say that he is Assistant Secretary of FEDERAL INSURANCE COMPANY and knows the corporate seal thereof; that the seal affixed to the foregoing Power of Attorney is such corporate seal and was thereto affixed by authority of the By-Laws of said Company, and that he signed said Power of Attorney as Assistant Secretary of said Company by like authority; and that he is acquainted with Frank E. Robertson and knows him to be the Vice President of said Company, and that the signature of said Frank E. Robertson subscribed to said Power of Attorney is in the genuine handwriting of said Frank

E. Robertson and was thereto subscribed by authority of said By-Laws and in deponent's presence.

Notarial Seal (SEAL)

Acknowledged and Sworn to before me on the date above written.

CERTIFICATION

By /s/ Linda Sawchak
Notary Public
LINDA SAWCHAK
Notary Public State of New Jersey
No. 9001052
Commission Expires July 29, 2001

STATE OF NEW JERSEY)
) ss.
County of Somerset)

I, the undersigned, Assistant Secretary of FEDERAL INSURANCE COMPANY, do hereby certify that the following is a true excerpt from the By-Laws of the said Company as adopted by its Board of Directors and that this By-Law is in full force and effect.

"ARTICLE XVIII

Section 2. All bonds, undertakings, contracts and other instruments other than as above for and on behalf of the Company which it is authorized by law or its charter to execute, may and shall be executed in the name and on behalf of the Company either by the Chairman or the Vice Chairman or the President or a Vice President,

jointly with the Secretary or an Assistant Secretary, under their respective designations, except that any one or more officers or attorneys-in-fact designated in any resolution of the Board of Directors or the Executive Committee, or in any power of attorney executed as provided for in Section 3 below, may execute any such bond, undertaking or other obligation as provided in such resolution or power of attorney.

Section 3. All powers of attorney for and on behalf of the Company may and shall be executed in the name and on benalf of the Company, either by the Chairman or the Vice Chairman or the President or a Vice President or an Assistant Vice President, jointly with the Secretary or an Assistant Secretary, under their respective designations. The signature of such officers may be engraved, printed or lithographed. The signature of each of the following officers: Chairman, Vice Chairman, President, any Vice President, any Assistant Vice President, any Secretary, any Assistant Secretary and the seal of the Company may be affixed by facsimile to any power of attorney or to any certificate relating thereto appointing Assistant Secretaries or Attorneys-in-Fact for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, and any such power of attorney or certificate bearing such facsimile signature or facsimile seal shall be valid and binding upon the Company and any such power so executed and certified by such facsimile signature and facsimile seal shall be valid and binding upon the Company with respect to any bond or undertaking to which it is attached."

I further certify that said FEDERAL INSURANCE COMPANY is duly licensed to transact fidelity and surety business in each of the States of the United States of America, District of Columbia, Puerto Rico, and each of the Provinces of Canada with the exception of Prince Edward Island; and is also duly licensed to become sole surety on bonds, undertakings, etc., permitted or required by law.

I, the undersigned Assistant Secretary of FEDERAL INSURANCE COMPANY, do hereby certify that the foregoing Power of Attorney is in full force and effect.

Given under my hand and the seal of said Company at Warren, N.J., this 9th day of January, 1997.

Corporate Seal (SEAL) /s/ Lorrine Miller
Assistant Secretary

IN THE EVENT YOU WISH TO NOTIFY US OF A CLAIM, VERIFY THE AUTHENTICITY OF THIS BOND OR NOTIFY US OF ANY OTHER MATTER, PLEASE WRITE TO US AT THE ADDRESS LISTED ABOVE.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LUNDELL MANUFACTURING COMPANY, INC., Plaintiff,	)	CASE NO. 92-4060
vs.	)	RESISTANCE TO MOTION TO ENFORCE LIABILITY ON BOND (Hearing Requested)
AMERICAN BROADCASTING COMPANIES, INC., Defendant.	)	

Defendant, American Broadcasting Companies, Inc. ("ABC") hereby opposes Plaintiff's motion for an order enforcing liability of the surety, Federal Insurance Company, on the bond filed January 23, 1997, on the following grounds:

1. Following the Eighth Circuit's denial of rehearing, the parties, by counsel, agreed that in lieu of execution of the judgment in this matter pending appeal by ABC to the United States Supreme Court, a bond would be filed with this court. Counsel for the parties also agreed on the amount of the bond. The agreed-upon bond was filed with the court on January 23, 1997.

2. There is no real dispute that in the event the Supreme Court leaves the judgment intact, it will be fully satisfied.

3. The bond, attached to Plaintiff's motion as Exhibit A, contains a typographical error in that it refers to American Broadcasting Companies, Inc. as "having appealed from said judgment *to* the Northern District of Iowa," whereas it should have stated "having appealed from said judgment *in* the Northern District of Iowa."

4. Plaintiff is aware that the erroneous substitution of the word "to" rather than "in" is a typographical error. Plaintiff seeks to subject the language of the bond to a meaning which is contrary to the intent of the parties and which renders the language meaningless and nonsensical.

5. As set forth in the accompanying Memorandum of Authorities, the interpretation of the bond's terms is like that of any other contract, and its purpose and the parties' intent are controlling.

6. ABC and the surety are prepared to file a superseding bond replacing the "to" with an "in." ABC is willing to entertain any other reasonable changes in the bond language suggested by Plaintiff's counsel.

7. ABC, Inc. is in the process of appealing to the United States Supreme court and an order entering judgment against the surety would not only contravene the terms of the bond and the intention of the parties, but would constitute a gross miscarriage of justice.

8. ABC requests the opportunity for oral argument on this motion and resistance.

WHEREFORE, Defendant prays that the Court deny the motion.

FAEGRE & BENSON LLP

By: Kasey Kincaid
Kasey W. Kincaid PK0002817
400 Capital Square
400 Locust Street
Des Moines, IA 50309
515/248-9000
515/248-9010(fax)

ATTORNEYS FOR AMERICAN
BROADCASTING COMPANY, INC.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon one of the attorneys of record for each party to the above entitled cause by enclosing the same in an envelope addressed to each such attorney at his/her last known address as shown below, with postage fully paid, and by depositing said envelope in a United States Post Office depository on the 14 day of February, 1997.

/s/ Illegible

Paul D. Lundberg
Shull, Cosgrove, Hellige & Lundberg
505 5th Street, Suite 700
P.O. Box 1828
Sioux City, IA 51102

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LUNDELL MANUFACTURING COMPANY, INC., Plaintiff, vs. AMERICAN BROADCASTING COMPANIES, INC., Defendant.	)	CASE NO. 92-4060 AFFIDAVIT OF KASEY W. KINCAID

STATE OF IOWA)
) ss.
COUNTY OF POLK)

1. After the Eighth Circuit's decision denying ABC's petition for rehearing and rehearing en banc, I contacted Paul Lundberg, Lundell's attorney, by telephone.

2. I discussed with Mr. Lundberg ABC's decision to pursue review in the United States Supreme Court. We further discussed filing a bond in order to forestall execution on the judgment during the pendency of the Supreme Court proceedings. Mr. Lundberg agreed with the filing of such a bond and that no action would be taken to execute against the judgment.

3. Mr. Lundberg and I also discussed the amount of the bond. It was agreed that a bond amount of $1,750,000 would be appropriate.

4. The bond was filed with the court on January 23, 1997.

5. ABC is in the process of appealing to the United States Supreme Court.

/s/ Kasey W. Kincaid
Kasey W. Kincaid

Subscribed and sworn to before me by the said Kasey W. Kincaid this 14th day of February, 1997.

/s/ Marsha Rodd
Notary Public in and for the State of Iowa

No. 96-1342

Supreme Court, U.S.
FILED
MAR 26 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMERICAN BROADCASTING COMPANIES, INC.,

Petitioner,

—v.—

LUNDELL MANUFACTURING COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

Of Counsel:

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FLOYD ABRAMS
Counsel of Record
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner
American Broadcasting Companies, Inc.

15 pp

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, petitioner American Broadcasting Companies, Inc. ("ABC") informs the Court of the following:

ABC is a wholly owned subsidiary of ABC Holding Company, Inc., which is itself a wholly owned subsidiary of ABC, Inc. ABC, Inc. is a wholly owned subsidiary of Disney Enterprises, Inc., which is itself a wholly owned subsidiary of The Walt Disney Company, a publicly held corporation. ABC has no nonwholly owned subsidiaries.

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REPLY BRIEF OF PETITIONER

Respondent's Brief in Opposition attempts to deflect focus both from the cert-worthy issues presented for review by the Petition and from the undisputed facts which define those issues. But those efforts cannot obscure the fact that the Petition raises important and unresolved issues of public figure definition which are squarely presented by the facts that respondent accepts, however grudgingly.

Thus, Lundell acknowledges that:

(1) "the garbage disposal problem in Berrien County" was "a public controversy" within the meaning of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) and its progeny—as the Eighth Circuit held (App. 20a, 98 F.3d at 363; *see* Brief in Opposition ("Br. Opp.") at 2);

(2) Lundell did, in fact, market and sell to Berrien County a machine it described as the "solution" to such garbage problem (Br. Opp. at 8); and

(3) Lundell's voluntary participation in efforts to solve the "problem" constituting the controversy and the role of its machine in addressing that problem had been the subject of newspaper coverage prior to any reporting by ABC (Br. Opp. at 7; R. 700; and see *infra* Part 2).

Nevertheless, Lundell maintains (and the Eighth Circuit held) that Lundell was not a public figure because it declined to speak out in a political debate that followed the heated discussion of the efforts of the Berrien County government to find a solution to the garbage problem itself. Respondent's opposition confounds that subsequent political debate with the public controversy defined by the Eighth Circuit (see, for example, Br. Opp. at 2) and offers a series of cleverly worded, if ultimately empty, charges of "misstatements" of the record,

designed to trivialize its role and support the asserted inappropriateness of review by this Court. We deal in Part 2 of this Reply with a point-by-point refutation of those charges, a refutation which underscores the red-herring character of those charges and at the same time makes clear the scope of the factors pointing to Lundell's limited-purpose public figure status.

We turn first to the key element of the Petition: the existence of a plain and significant split in the circuits on how to define a public figure, a subject of recurring controversy in the lower courts requiring guidance from this Court.

1. The Eighth Circuit's Analysis Of What Constitutes "Participation" In A Public Controversy Is Inconsistent With That Of Other Circuits In A Manner Which Requires Clarification And Resolution By This Court

At the core of Lundell's legal position is the notion that no conflict actually exists between the Eighth Circuit's approach to defining a public figure and that of other circuits. But its very quotation of the standards applied by the Third Circuit illustrates both the differing standards and the differing results to which they necessarily lead.

Lundell acknowledges that the Third Circuit examines two factors in determining whether a plaintiff is a "limited purpose public figure":

> "The court must consider
>
> (1) whether the alleged defamation involves a public controversy, and (2) the nature and extent of plaintiff's involvement in that controversy."

(Br. Opp. at 13) (*quoting McDowell* v. *Paiewonsky*, 769 F.2d 942, 948 (3d Cir. 1985))

Strikingly, there is no mention whatsoever of any requirement: (a) that plaintiff's participation in a controversy is to be

measured only by its *speech* (as opposed to a voluntary "course of conduct" that, in the language of the Third Circuit, "invites attention," *McDowell*, 769 F.2d at 949) or (b) that plaintiff's conduct which invites attention must be undertaken for purposes of injecting itself into a political debate to influence the issues involved.

Yet those are requirements that respondent's approach—echoing that of the Eighth Circuit—would graft onto the public figure rule. Neither *Gertz* nor any of this Court's later cases impose such requirements. Indeed, any such approach would undo the flexibility which most circuits have recognized in *Gertz*' broad focus on the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation" (418 U.S. at 352).

Here, if one applies the Third Circuit test, it is plain that plaintiff would be a public figure. The Eighth Circuit itself recognized the existence of a public controversy—the "garbage disposal problem in Berrien County" (App. 20a; 98 F.3d 363), and it is evident that Lundell voluntarily embarked on a course of conduct that "invited attention" (McDowell, 769 F.2d at 950) to its role in proffering a solution to that controversy. In this regard, the government official responsible for selecting Lundell's machine, the Berrien County Chairman, testified that the County Commission "ended up selecting Lundell Manufacturing Company's garbage recycling machine as the solution to [the County's] garbage problem" (R. 406)—the "solution" promised by Lundell in its advertising brochure (R. 287-88). The "nature and extent" of Lundell's voluntary action in proffering its machine as a solution to the County's garbage problem would thus render Lundell a limited purpose public figure in the Third Circuit.

Lundell seeks to minimize the significance of its touting of its product as the "solution" to garbage disposal problems by characterizing its own advertising as mere "slogan[s]" which were not made "in the context of the public debate in Berrien County." (Br. Opp. at 8) The Eighth Circuit, as well, con-

cluded that Lundell's sale of its machine was insignificant because ABC's journalist "admitted that she 'did not uncover any evidence from any source that [Lundell] had attempted to inject [itself] into [the] *political debate* of Berrien County.' " (App. 22a; 98 F.3d at 364) (emphasis added) But the public controversy recognized by the Eighth Circuit was "the garbage disposal problem in Berrien County." (App. 20a; 98 F.3d at 363) This was the very problem Lundell offered a solution to, a controversy that was already a focus of intense public attention. (R. 1109-12, 114-23, 1132-35, 1137-46) The political debate referred to by the Eighth Circuit erupted only *after*, indeed as a result of, the sale of the Lundell garbage recycling machine to Berrien County in September 1988 and the opening three months later of the Berrien County garbage recycling plant. (R. 129, 495-97, 1082-83, 1088-93, 1197-99, 1102, 1108)

That Lundell chose to stand silent in the political debate that ensued after the Berrien County government used public funds without voter approval to adopt the Lundell "solution" to the garbage disposal problem, does not alter the centrality of Lundell's involvement in the pre-existing controversy identified by the Eighth Circuit. Unlike the Eighth Circuit, the Third and Fifth Circuits recognize that "the plaintiff's action may itself invite comment and attention and even though [it] does not directly try or even want to attract the public's attention, [it] is deemed to have assumed the risk of such attention." *Marcone* v. *Penthouse International Magazine for Men*, 754 F.2d 1072, 1083 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); *see also Trotter* v. *Jack Anderson Enterprises, Inc.*, 818 F.2d 431, 435-36 & n. 16 (5th Cir. 1987).

This approach is not, as Lundell suggests, one which reflects a return to the "newsworthiness" standard of *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), rejected by this Court in *Gertz*. Emphasis on the voluntariness of a plaintiff's conduct, its character in inviting attention, and the requirement of the existence of a specific public controversy,

all elements looked to by the Third and Fifth Circuits, among others, reflect the focus in *Gertz* on concepts of "assumption of risk," a focus wholly absent from *Rosenbloom*.

But *Gertz*, for all its seminal import, raised and left unresolved certain critical ambiguities.[1] The open question, simply stated, is: where there is a pre-existing controversy (as there was *not* in *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979)), and where plaintiff's conduct in involving itself in the controversy was voluntary (as was *not* the case in *Wolston* v. *Reader's Digest Association*, 443 U.S. 157 (1979)), must a plaintiff set about to influence the outcome of the controversy through speech directed to that controversy? Or is it sufficient for public figure status that the plaintiff's conduct in involving itself in the public controversy is voluntary and is such as to "invite attention and comment?" *Gertz*, 418 U.S. at 345. That question remains unanswered; it is of enormous, continuing significance.

Respondent—and the Eighth Circuit—would add to the *Gertz* generalized focus on "the nature and extent of an individual's participation in the particular controversy" a gloss requiring a specific means of participation (speaking out to the press rather than through marketing literature or conduct, for example) and intent (to influence a political debate rather

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[1] The shared sense among lower courts, legal scholars and commentators is that *Gertz* itself needs to be revisited to provide additional guidance to the lower courts in determining who is a limited purpose public figure. See Petition at 8-10; and see, for example: Mark D. Walton, *The Public Figure Doctrine: A Reexamination of Gertz* v. *Robert Welch, Inc. in Light of Lower Federal Court Public Figure Formulations*, 16 N. Ill. U. L. Rev. 141, 159, 172 (1995) ("The U.S. Supreme Court's failure to articulate a precise standard of determining a defamation plaintiff's status that can be applied to varying fact situations has led to inconsistent and conflicting lower court determinations with regard to [the public figure] issue"; "[T]he need for the Court to clear up the confusion surrounding these issues seems obvious . . ."); *see also* Harry W. Stonecipher & Don Sneed, *A Survey Of The Professional Person as Libel Plaintiff: Reexamination of the Public Figure Doctrine*, 46 Ark. L. Rev. 303, 331 (1993).

than taking action knowing it will invite attention). Such elements, although certainly referred to in this Court's decisions, have not been treated by this Court as dispositive litmus tests to be applied in lieu of case-by-case analysis of the true "nature and extent" of the individual's role in the controversy.[2]

The flexibility inherent in evaluation of the overall "participation" standard offers a sounder means of accommodating the variety of factual circumstances that may arise in public figure analysis. The desirability of that approach seems evident here where the Eighth Circuit's approach results in stripping the protection of public figure status from the media's discussion of the very entity that offers a solution to the very "problem" that the court defined as the public controversy.

2. There Is No Factual Dispute Concerning The Nature And Extent Of Lundell's Participation In The Public Controversy Identified By The Eighth Circuit Which Precludes This Court's Review

The few basic facts framing the issues presented here are, as noted above, undisputed. Respondent, however, devotes a great deal of attention in its Brief in Opposition to factual matters in an apparent effort to suggest that Lundell was not really much involved in any public controversy at all. In fact, the undisputed record refutes respondent's contention (as it does each of respondent's claims of alleged "misstatements" in the Petition).

- Well before the ABC broadcast, as one of Lundell's own witnesses testified, there were "all kinds of newspaper articles coming out of Berrien, Georgia, that were negative about the [Lundell garbage recycling] system"; this

[2] Legal scholars have challenged the logic of any approach which treats a plaintiff's attempt to influence the outcome of a public controversy "as the sine qua non to public figure status." *See, e.g.*, Rodney A. Smolla, *Law of Defamation* § 2.17, at 2-50 (1996).

newspaper coverage was "very slanted" in suggesting "what a disaster this decision had been to buy this equipment," and, as a result of these "newspaper reports," "the people were blaming the machine." (R. 700)

- The record contains newspaper articles published well before the ABC broadcast that reported, *inter alia*: on discussions with "officials of the Lundell corporation in Iowa" quoting lower construction costs than a competitor and offering "accurate operation figures" to the Berrien County Chairman and indicating that the County's recycling plant "could be paid off in 10 years" (R. 1110); on Berrien County's plan to purchase the machine (R. 1117, 1118); on how the machine was to operate (R. 1135, 1139); on the selection of personnel to oversee installation of the equipment (R. 1123); on the need for a "Lundell representative" to come to Berrien County "to open the plant" (R. 1087), and on the visit of the "Lundell Company's representative" to the plant and the company's related promise to upgrade its equipment (R. 1080).[3] The record also contains a "public notice" referring to the recycling plant as "the Lundell System" and describing alternative ways "to solve the County's solid waste problems." (R. 1090)

- The Eighth Circuit itself noted that ABC began investigating the Berrien County garbage controversy only after its journalist reviewed a story in the *Atlanta Journal-Constitution* about the "Berrien County facility"—*i.e.*,

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[3] In fact, these and many other newspaper articles relating to the Berrien County garbage controversy were produced by Lundell before trial from Lundell's own file. (R. 290-91) Although respondent makes much of the testimony of Vernon Lundell, Lundell's president, that he personally did not see these clippings until a few months before trial (Br. Opp. at 6), the fact is that the Lundell *company*, the respondent here, maintained a file of newspaper clippings about the Berrien County garbage controversy dating back to 1987 (R. 289-291; 1079-1146). *It* cannot avoid its knowledge of the highly controversial market it chose to enter.

> the equipment Lundell sold to the County (App. 16a; 98 F.3d at 361). The *Atlanta Journal-Constitution* article featured a crude graphic of the Lundell "recycling machine," specifically described the public financing of the machine, reported that the County's garbage recycling plant had lost "money from the day it open[ed]," and concluded that Berrien County taxpayers were "stuck with a debt they didn't approve for a project that doesn't work." (R. 952)[4]

The reality is that Lundell was central, indeed billed itself as the "solution to," the public controversy recognized by the Eighth Circuit as "the garbage disposal problem in Berrien County" (App. 20a; 98 F.3d at 363). This central and voluntary involvement in a matter of public controversy should render Lundell a public figure and militates in favor of review of a legal approach which led to a contrary result.

3. Review Of The Rules For Public Figure Determination Is An Appropriate Function For This Court Under The Constitution

Respondent seems to suggest that appellate review of public figure determinations would be inappropriate because it would constitute a "case by case examination of trial court verdicts" (Br. Opp. at 18-19), and relies for the asserted impropriety of such review on a dissenting statement by Justice Harlan in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 63 (1971) (Harlan, J., dissenting) (Br. Opp. at 18-19). Apparently, Lundell would have this Court conclude that further

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[4] Although Lundell carefully asserts that the allegation that it employed the Berrien County Chairman as a sales representative for the Lundell garbage recycling machines did not "appear[ ] in any of the *local* media articles" (Br. Opp. at 8 (emphasis added)), the *Atlanta Journal-Constitution* reported that the County Chairman, a major proponent of the garbage recycling project, "later be[came] a sales representative for the company that makes the garbage machine" (R. 952). As the record reflects, this article was published prior to the ABC report.

development of the *Gertz* line of cases, necessarily dependent on review of public figure determinations in specific factual contexts, is somehow barred.

While *Gertz* indeed raised concerns about the standardless nature of the public figure inquiry under *Rosenbloom*, this Court never looked to Justice Harlan's dissent as precluding appellate review of particular public figure determinations. In fact, the Court later made clear in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1984), that "[its] role in marking out the limits of the standards through the process of case-by-case adjudication is of special importance" when the standard governing the decision of a particular case is provided by the Constitution. Nothing in *Gertz* or in the practice of this Court bars the Court from granting a petition to resolve recurring, vital questions which have created so significant a split among the circuits.[5]

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[5] In its final point in opposition (Br. Opp. at 19-20), respondent hypothesizes that the Petition could be mooted by respondent's motion to enforce a surety's liability on the appeal bond posted below by ABC. (Br. Opp. at 20) Even in the unlikely event that respondent's effort to collect on the bond because of a flaw in its wording were to succeed and Lundell's judgment against ABC were then satisfied out of the bond proceeds, any money judgment paid to Lundell could be recovered if this Court granted review and reversed the judgment below. *See, e.g.*, *Graddick* v. *Newman*, 453 U.S. 928, 945 n.* (1981) (Opinion of Justice Rehnquist) ("Since property transferred or money paid involuntarily pursuant to a judgment can be recovered, execution of the lower court's judgment pending appeal normally does not render the case moot."). *See also* 13A Charles A. Wright et al., *Federal Practice & Procedure* § 3533.2, at 247 (West 1984); 13A *id.*, at 156 (1996 Supp.) ("The general rule is now well settled: the case is not moot unless the parties intended to settle or unless it is not possible to take any effective action to undo results of compliance [with the judgment].")

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: March 26, 1997

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No. 96-1342

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMERICAN BROADCASTING COMPANIES, INC.,

Petitioner,

—v.—

LUNDELL MANUFACTURING COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER[1]

Pursuant to Rule 15.8 of the Rules of this Court, petitioner submits this Supplemental Brief to call to the Court's attention a decision of the United States District Court for the Northern District of Iowa in this matter rendered subsequent to the filing of petitioner's Reply Brief. That decision fully disposes of the contention made by respondent that the outcome of its motion before the district court could affect this Court's consideration of the Petition. *Cf. Board of License Commissioners* v. *Pastore*, 469 U.S. 238, 240 (1985).

In the April 2, 1997 decision of the district court, a copy of which is reprinted in the appendix to this Supplemental Brief, the court denied respondent's motion to enforce a bond that had been filed to secure the judgment pending review by this Court, conditioned on the filing of an appropriate bond by April 8, 1997.

Respondent had contended in its Opposition to the Petition that the pendency of its motion to enforce the bond had the potential to moot the Petition. (Brief in Opposition at 19-20) While petitioner, in its Reply Brief, cited authority in this Court and elsewhere making clear that mootness was not a risk (Reply of Petitioner at 9 n.5), the April 2, 1997 order of the district court denying respondent's motion makes clear beyond dispute that no claim about the technical terms of a bond can interfere with this Court's ability to entertain the Petition and to grant review.

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[1] Pursuant to Rule 29.6, petitioner American Broadcasting Companies, Inc. ("ABC") refers the Court to its Petition and Reply Brief for ABC's Rule 29.6 Statement.

Dated: April 4, 1997

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NO. C 92-4060
Filed: April 2, 1997

LUNDELL MANUFACTURING COMPANY, INC.,

Plaintiff,

—VS.—

AMERICAN BROADCASTING COMPANY, INC.,

Defendant.

ORDER

This matter comes before the court pursuant to plaintiff's January 28, 1997, motion to enforce surety's liability on bond (docket number 126). On January 23, 1997, Federal Insurance Company attempted to file a bond in this case to secure plaintiff's potential recovery on the judgment entered December 19, 1996, pending a ruling on the defendant's application for writ of certiorari to the United States Supreme Court. The caption does not describe the document as a bond but rather is entitled "Judgment In A Civil Case." The bond further purports to provide security pending appeal "to" rather than from the Northern District of Iowa. Obviously, the bond is designed

to secure plaintiff's recovery in the event that the defendant's application for writ of certiorari is denied. Counsel conferred together about the purpose of the bond and agreed to the amount of the bond.

The remedy here is to fix the bond. Both parties are entitled to have an appropriate bond posted with the court. Such arrangements shall be made by the defendant forthwith.

Upon the foregoing.

IT IS ORDERED

That plaintiff's January 28, 1997, motion to enforce surety's liability on the bond is denied on the condition that an appropriate bond be substituted on or before April 8, 1997.

April 2, 1997.

/s/ JOHN A. JARVEY
JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT